acted in concert with his brother, the shooter. Upon seeing the victims approach, respondent and Merendon ran into the trailer park, where Merendon retrieved a 36-inch shotgun. The two emerged together from behind a vehicle to confront the victims. Respondent stood behind his brother in a position to see and provide back-up support. Merendon accused the victims of shooting at their trailer and then shot Ramirez. Magdelano ran but fell and then heard a second shot. App. at 70a. There were two incidents of flight. Immediately after the shooting, respondent and Merendon fled together toward their trailer. A short time later police intercepted respondent trying to leave the area with his family. App. at 70a. Finally, when questioned by the police, respondent twice provided a false alibi, claiming he was inside the trailer when the shooting occurred. App. at 70a-71a.

4. The California Supreme Court denied review. App. at 82a.

5. The district court denied respondent's petition for writ of habeas corpus. Relying on the same four factors discussed above, it found that the state court's decision was not an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307 (1979), under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254(d)(1). App. at 34a-47a.

6. The Ninth Circuit Court of Appeals reversed. It recognized that the standard of review to be applied was whether the decision of the California Court of Appeal reflected an unreasonable application of *Jackson*. App. at 17a-18a & n.13. It found that the state court's decision was unreasonable because the evidence was insufficient as to all four of the factors relied upon by the state court.

Evidence of motive was lacking because, while Merendon suspected the victims of shooting at his family's trailer, the notion that respondent shared his brother's suspicion was "unsupported speculation." App. at 22a. And while Magdelano's punching respondent in the face and knocking him to the ground reflected "interpersonal tensions" between the two, in the circuit court's view, it did not "create a sufficiently

strong inference of motive" for murder. App. at 23a.

The state court's further determination that respondent's false alibi to the police reflected consciousness of guilt also was "bare conjecture," because "Juan H. might have made a false statement to law enforcement for any number of reasons, especially given that any statements he made as a witness would likely be used to prosecute his older brother, a member of his immediate family." App. at 22a.

As to flight, the circuit court concluded, "No reasonable trier of fact could find evidence of criminal culpability in the decision of a teenager to run home from the scene of a shooting, regardless of whether the home was in the same general direction as the car of a fleeing suspect. Likewise, any rational factfinder would find little or no evidence of guilt in the fact that Juan H. attempted, along with the rest of his family, to leave his home as it was being surrounded by an angry mob of neighbors." App. at 22a.

Finally, with respect to the offense conduct, the federal circuit court found that there was insufficient evidence that respondent knew his brother would assault or murder the victims, and that even if he did know, there was insufficient evidence that respondent intended to assist, encourage, or promote his brother's actions. With respect to knowledge, the court found:

> [T]he circumstantial evidence presented does no more than establish that a rational trier of fact could conclude that Juan H. knew his brother was armed and ready to confront Magdelano and Ramirez if the family and home of Juan H. were again threatened. That Juan H. stood behind his older brother after the family home had been attacked, even if he knew his brother was armed, does not permit the rational inference that he knew his brother would, without provocation, assault or murder the victims.

App. at 23a. With respect to respondent's action, the court found that no factfinder could reasonably conclude "that, by standing, unarmed, behind his brother, Juan H. provided 'backup,' in the sense of adding deadly force or protecting his

brother in a deadly exchange." App. at 24a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit Court of Appeals departed fundamentally from this Court's test for reviewing a claim of insufficient evidence. Instead of viewing all of the evidence in the light most favorable to the prosecution, *Jackson v. Virginia*, 443 U.S. at 319, the court employed the same "divide-and-conquer analysis" this Court rejected in *United States v. Arvisu*, 534 U.S. 266, 274 (2002), and evaluated the various pieces of evidence in isolation from one another rather than as a whole. In the process, the Ninth Circuit rejected evidentiary inferences routinely used by reviewing courts in upholding a finding of guilt and drew unreasonable conclusions from common factual scenarios, both of which will jeopardize criminal prosecutions throughout its jurisdiction.

Its error is particularly egregious because this case involves habeas review of a state court judgment, which requires the application of an additional layer of deference under AEDPA. Left unreviewed, the court's opinion will be cited for the propositions that (1) a teenage suspect who runs home from the scene of a murder is not engaged in flight as a matter of law; (2) consciousness of guilt cannot be inferred from lying to the police if other explanations not actually offered by the defense could exist; (3) an unarmed man cannot aid and abet an armed one by providing backup support; and (4) being the victim of an assault by a rival gang member is insufficient motive for murder or assault of the gang member. It will also stand for the proposition that "double deference" is meaningless.

1. This Court announced the test for reviewing claims of insufficient evidence over a quarter century ago. The reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319. More recently, in *Wright v. West*, 505 U.S. 277, 296-97 (1992), this Court noted that *Jackson*

> emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that '*all of the evidence* is to be considered in the light most favorable to the prosecution,' 443 U.S., at 319, 99 S.Ct., at 2789 (emphasis in original); that the prosecution need not affirmatively 'rule out every hypothesis except that of guilt,' *id.*, at 326, 99 S.Ct., at 2792; and that a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution,' *ibid.*

2. Under AEDPA, as relevant here, federal courts may not grant a petition for writ of habeas corpus unless the state court's decision resulted in a decision that was "contrary to, or involved an unreasonable application of," Supreme Court precedent. 28 U.S.C. §2254(d)(1). A state court decision is an "unreasonable application" of clearly established Supreme Court precedent if it is objectively unreasonable. *Williams v. Taylor*, 529 U.S. 362, 409 (2000). Federal circuit courts uniformly recognize that AEDPA requires the application of an additional layer of deference to the state courts' resolution of sufficiency of the evidence questions. *See Torres v. Mullin*, 317 F.3d 1145, 1151-52 (10th Cir. 2003); *Ponnapula v. Spitzer*, 297 F.3d 172, 180 (2d Cir. 2002); *Sanford v. Yukins*, 288 F.3d 855, 863 (6th Cir. 2002); *Wiggins v. Corcoran*, 288 F.3d 629, 636-37 (4th Cir. 2002), *rev'd on other grounds sub nom. Wiggins v. Smith*, 539 U.S. 510 (2003); *Piakowski v. Bett*, 256 F.3d 687, 691 (7th Cir. 2001); *Hurtado v. Tucker*, 245 F.3d 7, 16 (1st Cir. 1991).

3. Respondent was found liable for premeditated murder and attempted murder on an aiding and abetting theory. In California, a person is guilty of aiding and abetting if he (1)

knows the unlawful purpose of the perpetrator, (2) acts with the intent or purpose of committing, facilitating, or encouraging commission of the crime, and (3) by act or advice, aided, promoted, encouraged, or instigated the commission of the crime. *People v. Cooper*, 811 P.2d 742, 747 (Cal. 1991); *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984). The factors that may be considered in determining whether the defendant acted as an aider and abettor include presence at the scene of the crime, companionship, and conduct before and after the offense, including flight. *People v. Mitchell*, 228 Cal. Rptr. 286, 289 (Cal. Ct. App. 1986); *People v. Chagolla*, 193 Cal. Rptr. 711, 713-14 (Cal. Ct. App. 1983); *In re Jessie L.*, 182 Cal. Rptr. 396, 405 (Cal. Ct. App. 1982). An aider and abettor is responsible not only for any offense committed by his confederate that he intended to encourage, but also for any offense that is a natural and probable consequence of the offense he intended to encourage. *People* v. *Prettyman*, 926 P.2d 1013, 1020 (Cal. 1996); *People* v. *Croy*, 710 P.2d 392, 398, n.5 (Cal. 1985).

4. The state appellate court found substantial evidence to support the juvenile court's finding that respondent aided and abetted Merendon in the murder and attempted murder based on the totality of his action in concert with his brother, motive, false alibi to the police, and flight. The Ninth Circuit isolated each of these factors and found it objectively unreasonable for the state court to rely on any. The federal court acknowledged that the question was "whether the decision of the California Court of Appeal reflected an 'unreasonable application of' *Jackson* and *Winship* [*In re Winship*, 397 U.S. 358 (1970)] to the facts of this case." App. at 17a. In practice, however, the circuit court not only failed to review the state court's opinion under a "doubly deferential" standard, *see Yarborough v. Gentry*, 540 U.S. 1, 4 (2003) (per curiam), it failed to apply the (singular) deferential standard of *Jackson* itself.

5. Respondent fled home immediately after the shooting and then attempted to leave the trailer park with his family. The

Ninth Circuit found that no rational factfinder could infer consciousness of guilt from "the decision of a teenager to run home from the scene of a shooting" or an attempt to flee a house surrounded by an angry crowd. App. at 22a. These conclusions conflict with the well-established principle that flight, while "not necessarily indicative of wrongdoing . . . is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). This Court thus held in *Wardlow* that a person's unprovoked flight in a high crime area upon seeing the police constitutes reasonable suspicion to justify an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1997). By logical extension, it is also a relevant consideration in determining guilt.

This Court said as much over a century ago: "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen v. United States*, 164 U.S. 492, 499 (1896). Although flight is not "conclusive proof of guilt," *Hickory v. United States*, 160 U.S. 408, 421 (1896), "the flight of the accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt," *Alberty v. United States*, 162 U.S. 499, 510 (1896). *See also* 2 J.Wigmore, Evidence § 276, at 122-28 (Chadbourn rev. ed. 1979) ("It is universally conceded today that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself[.] . . . This principle has been sanctioned so many times that its frequent modern repetition has become redundant; no further judicial attention should be paid to any bill of exceptions so presumptuous as to raise the question." (Footnote omitted)).

Contrary to the Ninth Circuit's suggestion, the fact that other explanations may exist for flight does not preclude an inference of consciousness of guilt. Rather, as numerous courts, including the Ninth Circuit itself, have recognized, it is for the factfinder to decide whether the defendant's actions resulted from consciousness of guilt or some other motivation. *United States*

v. Akers, 215 F.3d 1089, 1103 (10th Cir. 2000); *United States v. Ross*, 123 F.3d 1181, 1184 (9th Cir. 1997); *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995); *People v. Rhodes*, 258 Cal. Rptr. 71, 74 (Cal. Ct. App. 1989) ("Alternative explanations for flight conduct go the weight of the evidence, which is a matter for the jury, not the court, to decide"); *People v. Barnett*, 954 P.2d 384, 454 (Cal.1998) (approving California jury instruction on flight because it informs jury it may consider alternative explanations); *People v. Yazum*, 196 N.E.2d 263, 264-65 (N.Y. 1963) ("Evidence of flight as indicative of a consciousness of guilt is a classic example of the admissibility of equivocal circumstantial evidence . . . [A]mbiguities or explanations tending to rebut an inference of guilt do not render flight evidence inadmissible but, rather, must be introduced as part of the defense and submitted to the jury."). On review under *Jackson* and AEDPA, the court must presume that any reasonable inferences to be drawn from the evidence were drawn in favor of the judgment.

A rational trier of fact here could conclude that respondent fled home because he had nowhere else to go to avoid apprehension for the shooting of Ramirez; at age 15, he had no driver's license and presumably no car of his own. Fleeing on foot seemingly appeared futile with residents of the trailer park, most of whom associated with Norteños, after him. Once home, however, respondent, with the rest of his family, did attempt to flee the scene by car. While it is true that they were surrounded by a crowd at the time, it is not clear whether the crowd gathered in response to the shooting or the family's attempt to flee. The weight of that fact, in any event, was for the factfinder to determine. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). It surely was not objectively unreasonable for the state court to find that respondent's flight exhibited consciousness of guilt. The Ninth Circuit's conclusion to the contrary is inconsistent with *Jackson*'s requirement that all reasonable inferences be drawn in support of the judgment and with AEDPA's double deference requirement.

6. Respondent told the police immediately after the shooting and the following day at the police station that he was inside his trailer at the time of the second shooting, a claim clearly contradicted by Magdelano's testimony. The Ninth Circuit characterized the state's court determination that these lies reflected consciousness of guilt as "bare conjecture." App. at 22a. It then offered its own conjecture that respondent might have been lying to protect his brother, even though respondent himself never made such a claim. App. at 22a.

The circuit court's determination again conflicts with *Jackson*'s requirement that all reasonable inferences be made in support of the judgment and with AEDPA's heightened deference requirement. Lying, like flight, has long been held admissible as evidence of consciousness of guilt. 2 J.Wigmore, Evidence § 278, at 133 (Chadbourn rev. ed. 1979) ("It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's *falsehood or other fraud* in the preparation and presentation of his cause . . . is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness inference may be inferred the fact itself of the cause's lack of truth and merit."). It was certainly not objectively unreasonable for the state court to conclude that respondent lied to protect himself, instead of, or in addition to, his brother, especially when no explanation for the lie was actually offered.

7. The state court properly found that the record supported a finding that respondent had a motive to commit the offenses. He had thrown Sureño gang signs at Magdelano, a Norteño, prompting Magdelano to punch him in the face and knock him down a couple of weeks before the shooting. Though Magdelano and Ramirez had spoken to respondent's father and brother after that event about avoiding problems, shots were fired into respondent's trailer on the night of the crime. Merendon, accompanied by respondent, killed Ramirez only an hour and a half after the shooting into the brothers' home.

Before killing Ramirez, Merendon accused him of shooting at their house. Nevertheless, the Ninth Circuit dismissed as "unsupported speculation" the notion that respondent too believed the victims had shot at his house. App. at 22a.

Once again, the circuit court's conclusion conflicts with *Jackson*, which requires consideration of "all of the evidence." *Jackson*, 443 U.S. at 319; *see also United States v. Hooks*, 780 F.2d 1526, 1532 (10th Cir. 1986) (rather than examining the evidence in "bits and pieces," the court must evaluate the sufficiency of the evidence by "consider[ing] the collective inferences to be drawn from the evidence as a whole"). Here, given the timing of the shooting, shortly after respondent's own house had been attacked, the brothers' joint action of suddenly running into the trailer park upon the victims' approach and then coming out from behind a vehicle to confront the victims, respondent's silence in the wake of his brother's accusation against the victims, and respondent's flight and lies, it is hardly speculative to infer that he, like his brother, believed the victims were responsible for the earlier shooting.

More troubling still is the Ninth Circuit's conclusion that Magdelano's prior assault on respondent in response to respondent's making gang signs at him reflected "interpersonal tensions" between the two, but failed to create a sufficiently strong inference of motive for murder or assault with a deadly weapon. App. at 23a & 25a, n.15. Such a conclusion ignores the "nature of modern gang warfare." *People v. Montes*, 88 Cal. Rptr. 2d 482, 486 (Cal. Ct. App. 1999). "When rival gangs clash today, verbal taunting can quickly give way to physical violence and gun fire." *Id.* In California, people have been killed for such transgressions as wearing the wrong color clothing, *People v. Williams*, 66 Cal. Rptr. 2d 123, 151 (Cal. Ct. App. 1997), defacing gang graffiti, *People v. Olguin*, 37 Cal. Rptr. 2d 596, 599-600 (Cal. Ct. App. 1994), and making gang gestures and statements, *People v. Godinez*, 3 Cal. Rptr. 2d 325,

327 (Cal. Ct. App. 1992).[1/] It is simply unreasonable to say that an actual prior physical assault by a rival gang member does not create sufficient motive for an even more violent reprisal.

8. Finally, the Ninth Circuit improperly found insufficient evidence of knowledge or intentional action on respondent's part during the shooting. With respect to knowledge, the court did not dispute that respondent knew his brother had a gun, but found it irrational to infer he knew his brother would use it to assault or murder the victims "without provocation" rather than to keep it ready in case the victims again threatened them. App. at 23a. In light of the gang context of the shooting, it is the circuit court's inference that is irrational. Respondent knew his brother was armed and about to confront rival gang members following an attack on their family home. It is eminently rational to infer he knew his brother would use the gun. Such action would not be "without provocation." The provocation was the first shooting. As noted earlier, far more benign acts can and do lead to violence when gangs are involved.

With respect to respondent's action, the court found it irrational to infer "that, by standing, unarmed, behind his brother, Juan H. provided 'backup,' in the sense of adding deadly force or protecting his brother in a deadly exchange." App. at 24a. This finding conflicts with *Jackson*'s requirement that sufficiency review be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324, n.16. California law does not require an aider and abettor to "add" deadly force or to "protect" the direct perpetrator. It is enough if respondent, by his presence, promoted or encouraged Merendon to commit the crimes, with the intent to do so. Nor did respondent have to be armed to provide effective backup. His presence turned what

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1. In another recent case overturned by the Ninth Circuit for insufficient evidence, the victim was robbed for asking a gang member, "How do you do?" *Garcia v. Carey*, 395 F.3d 1099, 1101 (9th Cir. 2005).

would have been a one-on-two confrontation into a two-on-two confrontation, and thus evened the teams in the event the victims attempted an attack of their own. Respondent was also available to warn Merendon of, and repel, any third parties who attempted to intervene. California courts routinely uphold convictions in which the defendant's actions were similar to respondent's. *See, e.g., People v. Campbell,* 30 Cal. Rptr. 2d 525, 530 (Cal. Ct. App. 1994) (jury could reasonably conclude defendant stood in front of victims "to intimidate and block them, divert suspicion, and watch out for others who might approach"); *People v. Moore*, 260 P.2d 1011 (Cal. Ct. App. 1953) (defendant's presence during robbery "could have given encouragement to his companions and acted as a deterrent to any continued resistance" by the victim); *People v. Mummert*, 135 P.2d 665, 668 (Cal. Ct. App. 1943) (defendants who stood by while perpetrator raped victim aided and abetted "by presenting a show of force and by keeping watch against intrusion").

9. In addition to violating *Jackson* by substituting its own judgment for that of the state court with respect to each individual factor discussed above, the Ninth Circuit violated *Jackson* a second way by evaluating each factor in isolation rather than in the context of the total circumstances. As in *Arvizu*, the circuit court appeared to believe that each piece of evidence "that was by itself . . . susceptible to innocent explanation was entitled to 'no weight.'" *United States v. Arvizu*, 534 U.S. at 274. But "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987); *see also United States v. DeLeon*, 641 F.2d 330, 336 (5th Cir. 1981) ("[I]n law, unlike plane geometry, the whole may be greater than the mere sum of the parts."). That is the case here.

10. The impact of the Ninth Circuit's decision reaches well beyond the parties in this case. Gang violence is a serious

problem beyond California. Convictions in such cases are often based on aider and abettor liability. The judgment below, however, in effect places common fact patterns out of bounds for purposes of sufficiency-of-the-evidence review. Guilty teenagers who flee the scene of a crime, like guilty adults, often flee home. Gang members who are assaulted commonly engage in murderous retaliation. Guilty people routinely lie to the police to protect themselves, even when close relatives are also involved. And armed perpetrators are frequently aided by unarmed, but equally guilty, companions. Correcting the Ninth Circuit's crabbed and piecemeal application of *Jackson* and AEDPA is thus of great importance to maintaining effective law enforcement within its borders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: October 3, 2005

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Juan H.,	)	
Petitioner-Appellant,	)	**No. 04-15562**
	)	
v.	)	**D.C. No.**
	)	**CV-02-02018-CW**
Walter Allen III,	)	
Respondent-Appellee.	)	**OPINION**

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
December 8, 2004—San Francisco, California

Filed June 2, 2005
Amended July 8, 2005

Before: Dorothy W. Nelson, Andrew J. Kleinfeld, and
Ronald M. Gould, Circuit Judges

Opinion by Judge Gould

COUNSEL

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Bill Lockyer, Attorney General for the State of California, Robert R. Anderson, Chief Assistant Attorney General for the

State of California, Gerald A. Engler, Senior Assistant Attorney General for the State of California, Gregory A. Ott, Deputy Attorney General for the State of California, Moona Nandi, Supervising Deputy Attorney General for the State of California, for the respondent-appellee.

OPINION

GOULD, Circuit Judge:

Petitioner Juan H. appeals the United States District Court decision denying a writ of habeas corpus. He argues that his California juvenile delinquency petition for first-degree murder and attempted first-degree murder was sustained in violation of: 1) *Miranda v. Arizona*, 384 U.S. 436 (1966); 2) the Fifth Amendment prohibition on the use of involuntary or coerced statements; and 3) the Fourteenth Amendment due process right to be convicted by evidence that proves guilt beyond a reasonable doubt. The district court denied the writ. We have jurisdiction pursuant to 28 U.S.C. § 2253. We reverse the judgment of the district court and remand with instructions to grant the writ of habeas corpus.

I.

This case arises from a gang-related shooting death that occurred in Salinas, California on March 24, 1999.[1]

Some background facts before that fateful day assist our

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1. On habeas corpus review, the district court was required to resolve all conflicting factual inferences in favor of the prosecution, and we must view the state court evidence in the same light. *Jackson v. Virginia*, 443 U.S. 307, 326 (1979) ("[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.").

understanding. Fifteen-year-old Juan H., his brother Felix Merendon, and other members of their family lived in the same Salinas trailer park as Luis Ramirez and Sylvester Magdelano. Juan H. and his family associated with the Sureno gang, and Ramirez, Magdelano and other park residents associated with the Norteno gang. Magdelano testified that during the months before the shooting, Juan H. made gang gestures and tried to "stare [him] down." In response, on March 10, 1999, Magdelano told Juan H. that gang signs were unwelcome, punched him in the face and knocked him to the ground. Later, Magdelano, Ramirez, and two others spoke to Merendon and Juan H.'s father about avoiding problems.

On March 24, 1999, Juan H. and his family were at home when, at approximately 9:00 pm, an unknown person or persons fired at least two shots at their trailer. The Salinas police responded to the incident, but made no arrest. About one-and-a-half hours later, Magdelano and Ramirez were walking through the trailer park and saw Juan H., Merendon and their family standing outside.[2/] Juan H. and Merendon ran out of Magdelano's sight into the trailer park. Merendon reappeared from between two trailers and approached Magdelano and Ramirez. Juan H. followed his brother and stood behind him. Merendon asked Magdelano and Ramirez if they "were the ones that shot up his pad." Ramirez said that he did not know what Merendon was talking about. Merendon then pulled a shotgun from his side or the front of his pants, and shot Ramirez.[3/] Ramirez died from his wounds. Magdelano

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2. Much of the factual detail about the shooting incident is derived from Magdelano's state court trial testimony.

3. Magdelano testified that he did not see the gun until Merendon shot Ramirez, but that Merendon had the gun at his side, and that Juan H. could have seen it from where he was standing. Salinas Police Department Detective Joseph Gunter testified that he and Detective Gerry Davis interviewed Magdelano at the time of the shooting and that Magdelano then told the officers that Merendon took the gun from down the front of his pants. Davis testified regarding the same interview that Magdelano said that

fell to the ground and heard a second shot but was not hit. During the shooting, Juan H. did not say anything, make any gestures, or otherwise encourage Merendon.[4/] Merendon ran to his car and drove away in flight. Juan H. ran home to his family's trailer. The shooting incident lasted only about two seconds, but took the life of Ramirez, led to the flight of Merendon, and ultimately resulted in the conviction and incarceration of Juan H.

Ricardo Rubio testified that Merendon came to his house alone on the night of the shooting with a 36-inch long shotgun, and that Merendon said that he had shot one person and fired at another. Merendon described the incident using the first-person singular and did not mention that Juan H. was with him. In addition, Billy M., a thirteen-year-old neighbor of Juan H. and Merendon, testified that he ran outside of his trailer shortly after Ramirez was shot and saw Ramirez lying on the ground. According to Billy M.'s testimony, Juan H. was outside with his family, pointed his fingers in the fashion of a gun and said to Billy M., "You better watch it." Although Billy M. testified that he told this to his vice-principal, John Gutierrez, Gutierrez

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Merendon took the gun from his side.

4. Magdelano's testimony, which was the only evidence on this point, was as follows:

Q: Juan didn't say anything, did he?
A: No.
Q: Didn't throw any gang signs?
A: No.
Q: Didn't make any gestures?
A: No.
Q: Didn't flash any weapons?
A: No.
Q: Didn't stick his hand down his pants like he had a weapon in his waistband or pockets or anything like that?
A: No.
Q: Just standing there a little bit behind his brother?
A: Yeah.

testified that Billy M. never mentioned this incident while discussing the shooting.

Police arrived shortly after the shooting of Ramirez, and saw a hostile crowd surrounding Juan H. and his family as they attempted to back out of their driveway in their minivan. The police intervened, detaining Juan H. and his family at their trailer. Detective Gunter interviewed Juan H. that evening, and the minor told Gunter that he was in his trailer with his family when the shooting occurred.

The next day, Gunter and Salinas Police Department Officer Jerry Jones conducted a custodial interrogation of Juan H. At the outset of this interrogation, Gunter told Juan H.:

> Okay. But, you know, since you're here and we're not at your house, there's something I have to do before we go back over what you told me last night, okay? You know, and that's the law, so I don't want to violate the law. Remember I told you I worry about things like that. Now, I want to remind you you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer we'll appoint one to represent you. Do you understand those, Juan?

Juan H. indicated that he understood his rights. Gunter asked Juan H. questions about his previous involvement with the criminal justice system, and then Gunter said, "Now you don't mind talking to me about what you told me last night, am I right, about what happened?" Juan H. indicated that he did not mind and proceeded to answer questions about the shootings. Several minutes later, Juan H. asked, "I could get a, like, lawyer right now if I want?" Gunter replied, "Yes, if that's what you decided you wanted." Juan H. then responded that he did not want an attorney.

The interrogation continued. Gunter said:

And then let's say I do arrest you. And if the judge looks at what I have to say. What do you think he's going to say if I say, "Juan came in to me and he said—told me this story that wasn't the whole truth." Or if I can go to the judge and say, "Juan came in here and he told me everything that was true. He didn't pull any punches. Something bad happened to his family, and they had to take care of business." Or is the Judge going to look at this and say, "He lied. Don't like people who lie. But I like people who tell the truth, because true people we can help and work with." Don't you agree with that?

. . . .

That's not what happened, Juan. You and your brother were out there when those guys came across the street. . . . And then your brother shot the shotgun. Probably shocked you a lot because you probably didn't expect him to shoot anybody. Because you guys were out there making sure nobody came back and shot your family, and I understand that. Because I would have been out there. If it would have been my house I would have been out there waiting for them . . . . Nobody has a problem with people taking care of their family.

Jones added:

Juan, I think what Joe's trying to say is we're not looking to make more out of this than there actually is, okay? And we don't think that, you know, that you guys were out there looking for trouble. We think that you guys were out there trying to take care of your family. And if that's the way—I mean, you know, taking care of your family and looking for trouble, I mean nobody can blame you for that, okay?

. . . .

So we're not looking to make this out like it's a huge deal, because we know—we know that you guys were out

> there and you were looking out for your family, which is no different probably than any one of us would have done.

Gunter then told Juan H., "Everybody would do that. Most good people will do that, okay?"

Despite the officers' attempts to sway him, Juan H. continued to maintain that he was inside his trailer with his family when Merendon shot Ramirez and attempted to shoot Magdelano.[5/] Juan H. then invoked his right to counsel by stating:

> I want a . . . I want a . . . somebody right here . . . . Like you guys said if I need a lawyer or something or I can't afford one you guys will provide one for me or something like that . . . . Well, I want a lawyer. [I am telling you] that I need a lawyer or something . . . I need a lawyer. I need a lawyer or something.

Even after Juan H. repeatedly invoked his right to counsel, Gunter and Jones continued to interrogate him regarding the crimes and the whereabouts of Merendon. After several further minutes of interrogation, Gunter left the room, and Juan H. inquired, "Did [Gunter] go to get my lawyer for me?" Jones replied, "Well, your lawyer is not going to come here," and continued with the questioning. In accordance with *Miranda v. Arizona*, the state trial court suppressed those portions of the interrogation that followed Juan H.'s demand for counsel, and we do not consider this suppressed evidence, which, in any event, would have added little or nothing to the case against Juan H. *See* 384 U.S. at 473-74.

The police failed to apprehend Merendon, and instead

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5. Gunter testified that Juan H. "told [him] that, yes, in fact, he had been outside of the trailer at the time of the shooting." As the California Court of Appeal recognized, "the tape provides little, if any, support for such a view." Gunter also testified that Juan H. made this admission twice, a statement clearly contradicted by the videotape.

charged Juan H. with first-degree murder and attempted first-degree murder under a theory of aiding and abetting. More specifically, the charges against Juan H. alleged that he did "willfully, unlawfully and with malice aforethought murder, LUIS ALEJANDRO RAMIREZ" in violation of California Penal Code section 187, and did "willfully, unlawfully and with malice aforethought attempt to murder, SYLVESTER MAGDALENO [sic]" in violation of California Penal Code sections 664 and 187.

The videotaped interrogation was admitted into evidence over the objection of trial counsel that Juan H.'s statements were obtained in violation of Miranda. Trial counsel did not object on the basis that the statements were involuntary or coerced in violation of the Fifth Amendment.

Juan H. filed a motion in state court to dismiss the charges on the ground that there was insufficient evidence to sustain the delinquency petition. The motion was denied, and on May 21, 1999, the Monterey Juvenile Court found Juan H. culpable of the first-degree murder of Luis Ramirez and the attempted first-degree murder of Sylvester Magdelano. Juan H. was committed to the California Youth Authority for a sentence of 34 years and 8 months to life in prison.[6]

Juan H. appealed his conviction to the California Court of Appeal. The Court of Appeal affirmed in a reasoned opinion holding that evidence of motive, conduct, common flight and false alibi supported the delinquency petition. The California Supreme Court affirmed without opinion. Juan H. then filed a petition for a state writ of habeas corpus, and the California Supreme Court denied the writ. Having exhausted his state-court remedies, Juan H. petitioned for a federal writ of habeas corpus in the United States District Court for the

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6. In California, juvenile offenders who remain in custody into adulthood are physically transferred into the California Department of Corrections system at age 21, Cal. Welf. & Inst.Code § 1802, and legally transferred at age 25, *id.* at § 1769(b).

Northern District of California. The district court denied the petition, and Juan H. appeals this ruling.

II.

In assessing this appeal, it is necessary to start with a recognition of the deeply significant fact that Juan H. is a state prisoner and we are a federal court. With this in mind, we turn to the demanding standards governing and restricting the permissible grounds for the grant of a federal writ of habeas corpus in a case involving a state court criminal conviction under 28 U.S.C. § 2254.[7]

[1] Habeas corpus is an "extraordinary remedy" available only to those "persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993) (quoting *Fay v. Noia*, 372 U.S. 391, 440-41 (1963), *abrogated on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991)). Because Juan H. filed his habeas petition after April 24, 1996, the provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) govern this case and pose special burdens. *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir.2004) (en banc). Under AEDPA, when reviewing a state criminal conviction, we may grant a writ of habeas corpus only if a state court proceeding "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under § 2254(d)(1), a state court decision is "contrary to"

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7. We review de novo a district court decision to deny a writ of habeas corpus. *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir.2003). Although we normally review for clear error any factual findings of the district court, *id.*, in this case the district court made no independent factual findings, and so we review the state court findings under the deferential standards of AEDPA, discussed below.

clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court cases or "if the state court confronts a set of facts that are materially indistinguishable from" a Supreme Court decision but "nevertheless arrives at a result different from" that precedent. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court decision is an unreasonable application of clearly established Federal law if "the state court identifies the correct governing legal principle" from a Supreme Court decision "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. In considering whether a state court has unreasonably applied Supreme Court precedent, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411; *see also Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (holding that it is not enough that a federal habeas court is left with a "firm conviction" that a state court violated the Constitution and that the state court determination must also be objectively unreasonable); *Bell v. Cone*, 535 U.S. 685, 694 (2002). In conducting habeas review, we "presum[e] that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam).[8]

We apply these principles to the habeas claims Juan H. brings before our court.

III.

Juan H. first argues that his conviction resulted from the admission of a confession obtained in violation of *Miranda v.*

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8. Aside from determining whether a state court has unreasonably applied a provision of federal law or the Constitution, under § 2254(d)(2), a federal court may also grant a writ of habeas corpus if a material factual finding of the state court reflects "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

Arizona, 384 U.S. 436.

In *Miranda*, the Supreme Court established the widely recognized rule that, during a custodial interrogation, an accused:

> . . . must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 478-79. The requirements of *Miranda*, as much or more than any other rule of constitutional criminal procedure, are "clearly established" federal law within the meaning of AEDPA. 28 U.S.C. § 2254(d); *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

[3] Although an accused must affirmatively waive the *Miranda* rights before custodial interrogation by law enforcement officers, *Miranda*, 384 U.S. at 474-75, such a waiver need not be express so long as the totality of the circumstances indicates that the waiver was knowing and voluntary, *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) ("The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case."). The totality-of-the-circumstances test applies to the interrogation of juveniles and "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

The California Court of Appeal cited to and discussed

Miranda and *Butler* in its last reasoned decision and correctly identified the legal principles clearly established by these precedents. We therefore ask whether the state court unreasonably applied these principles to the facts of this case. *Williams*, 529 U.S. at 413.[9]

[4] Here, because we have a videotape of the challenged interrogation, there is no mystery about any communications that related to Miranda's requirements. The videotape of the custodial interrogation Gunter and Jones conducted with Juan H. reflects that the minor was explicitly informed of his *Miranda* rights, and apparently understood and waived these rights at the outset of the interrogation, although he later invoked his right to counsel. Before beginning questioning, Gunter told Juan H.:

> Okay. But, you know, since you're here and we're not at your house, there's something I have to do before we go back over what you told me last night, okay? You know, and that's the law, so I don't want to violate the law. Remember I told you I worry about things like that. Now, I want to remind you you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer we'll appoint one to represent you. Do you understand those, Juan?

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9. Even if we were to conclude that the videotape was admitted in violation of Miranda, a writ of habeas corpus would be warranted only if the error "had substantial and injurious effect or influence in determining the . . . verdict." Brecht, 507 U.S. at 637, 113 S.Ct. 1710 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *Penry v. Johnson*, 532 U.S. 782, 795, 121 S.Ct. 1910 (2001). We have no occasion to undertake a harmless-error inquiry here because we conclude below that the state court was not objectively unreasonable in determining that there was no Miranda violation.

This statement in its material elements closely tracks the language of *Miranda*. *Cf.* 384 U.S. at 478-79, 86 S.Ct. 1602. Juan H. nevertheless challenges the opening sentences: "But, you know, since you're here and we're not at your house, there's something I have to do before we go back over what you told me last night, okay? You know, and that's the law, so I don't want to violate the law." Juan H. contends that these sentences downplayed the import of the *Miranda* warnings, and thus vitiated their efficacy. We disagree. This language did not convey that the *Miranda* warnings were unimportant. On the contrary, it indicated that the warnings had serious legal meaning and that the policeman acknowledged that the setting was custodial. Also, subsequent events during the interrogation support a conclusion that Juan H. understood the importance of his *Miranda* rights. When Juan H. finally invoked his right to counsel, he referred back to the warnings, stating, "Like you guys said if I need a lawyer or something or I can't afford one you guys will provide one for me or something like that . . . Well, I want a lawyer." This subsequent demand for counsel by Juan H. and the completeness of the warnings given by Gunter demonstrate that Juan H. was informed of and understood the content and importance of his *Miranda* rights.

[5] Juan H. also effectively waived his Miranda rights. Shortly after giving Juan H. the *Miranda* warnings, Gunter asked him, "Now you don't mind talking to me about what you told me last night, am I right, about what happened?" Juan H. indicated that he was willing to talk and proceeded to answer questions about the events of March 24, 1999. In addition, Juan H. later inquired, "I could get a, like, lawyer right now if I want?" When Gunter replied, "Yes, if that's what you decided you wanted," Juan H. again indicated that he did not want the assistance of counsel. The state court was not unreasonable in holding that Juan H.'s responses constituted a valid waiver of his *Miranda* rights. *See Butler*, 441 U.S. at 373.

In summary, the totality of the circumstances shown in the state court record indicates that the state court was not

objectively unreasonable in concluding that Juan H. was apprised of his *Miranda* rights, that he actually understood those rights, and that he validly waived them for the portions of the interrogation admitted into evidence. *See Fare*, 442 U.S. at 725-26.[10/]

IV.

Juan H. next contends that his conviction was obtained through the use of coerced or involuntary statements in violation of the Fifth Amendment. Because his trial attorney did not object to the admission of the statements on the basis of voluntariness, Juan H. frames his coercion claim by arguing that failure to raise this objection constituted ineffective assistance of counsel within the meaning of the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984).

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins*, 539 U.S. at 521. In evaluating whether the performance of counsel was deficient in a constitutional sense the relevant question is whether "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In considering prejudice, the appropriate inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The California Court of Appeal cited to *Strickland*

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10. Juan H. further contends that the state court erred in treating the question of waiver as a factual, rather than a legal, question in violation of *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The holding of *Miller*—a case governing the standards federal courts should use in adjudicating claims of coerced or involuntary confessions when sitting in habeas—is inapplicable here. Federal courts are not in the business of mandating how state courts decide the cases on their dockets, so long as the results are not unreasonable and the methods employed conform to the broad requirements of due process. *See Patterson v. New York*, 432 U.S. 197, 201-02 (1977).

and its holding in rejecting Juan H.'s ineffective assistance of counsel claim. We therefore consider whether the state court unreasonably applied the principles of *Strickland*. *Williams*, 529 U.S. at 413.

[6] Here, the merits of the coercion claim control the resolution of the *Strickland* claim because trial counsel cannot have been ineffective for failing to raise a meritless objection. Under the Fifth Amendment, a confession is coerced or involuntary if "the defendant's will was overborne at the time he confessed." *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). A totality-of-the-circumstances test applies in determining whether the will of an accused was "overborne." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Coercion can be mental or physical, but to render a statement involuntary, coercion must exist to such a degree that the statement is not "the product of an essentially free and unconstrained choice by its maker." *Schneckloth*, 412 U.S. at 225 (*quoting Culombe v. Connecticut*, 367 U.S. 568 (1961)); *see also Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). It is not enough, even in the case of a juvenile, that the police "indicate that a cooperative attitude would be to [the] benefit" of an accused unless such remarks rise to the level of being "threatening or coercive." *Fare*, 442 U.S. at 727, 99 S.Ct. 2560.

[7] We have carefully reviewed the videotape of Gunter and Davis interrogating Juan H. Notwithstanding Gunter's testimony to the contrary, we agree with the California Court of Appeal that Juan H. never "confessed" in any common sense of the word. Although Jones and Gunter misrepresented the serious potential legal consequences Juan H. would face were he to admit involvement in Merendon's crimes, Juan H. stood his ground. The minor remained in control of his responses during the interrogation, and the videotape contains nothing that would indicate that his will was "overborne." *See Lynumn*, 372 U.S. at 534. Perhaps more importantly, even if Juan H. had confessed after police trickery, the interrogators did not use coercive means sufficient to render Juan H.'s statements

involuntary. *See Fare*, 442 U.S. at 727. Any objection to the admission of the videotape on the basis of coercion would properly have been overruled. The California Court of Appeal was not objectively unreasonable in holding that the performance of counsel did not fall below an "objective standard of reasonableness" on account of not raising this meritless objection. *See Strickland*, 466 U.S. at 688.[11]

V.

Juan H. finally argues that the state court decision sustaining his juvenile delinquency petition violated his Fourteenth Amendment due process right to be convicted by evidence that proves his guilt beyond a reasonable doubt.

[8] As a matter of federal constitutional law, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see also Herrera v. Collins*, 506 U.S. 390, 402 (1993) (noting that "a conviction based on evidence that fails to meet the Winship standard" is an "independent constitutional violation"). A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds. In *Jackson v. Virginia*, the Supreme Court held that "the relevant question is whether, after

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11. Although we have no occasion to consider prejudice, we note the fundamental error in the state's argument that the videotape was "exculpatory" because it "discredited" Gunter's false testimony, introduced by the prosecution as part of its case-in-chief, that Juan H. twice admitted being outside with Merendon. If the prosecution has secured a conviction through use of a truly involuntary or coerced statement, the state may not render this error "harmless" or demonstrate lack of prejudice by introducing false evidence at trial and later maintaining that the accused's involuntary statements "discredited" this offer of proof. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Miranda*, 384 U.S. at 476-77; *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The state's suggestion to the contrary is devoid of merit.

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319.

A.

After AEDPA, we apply the standards of Jackson with an additional layer of deference. 28 U.S.C. § 2254(d). In this case, the California Court of Appeal neither applied a standard fundamentally at odds with Supreme Court precedent nor reached a different result on materially indistinguishable facts.[12] Thus, we agree with our sister circuits who have addressed the issue that we must ask whether the decision of the California Court of Appeal reflected an "unreasonable application of" *Jackson* and *Winship* to the facts of this case. *See* 28 U.S.C. §

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12. In its last reasoned decision, the California Court of Appeal used the following standard in reviewing the claim based upon sufficiency of the evidence:

> In reviewing the denial of a motion to dismiss, we apply the substantial evidence test, under which we view the record in the light most favorable to the court's order and presume in support thereof the existence of every fact that may reasonably be deduced from the evidence. (*In re Man J.* (1983) 149 Cal.App.3d 475, 482; *see People v. Johnson* (1980) 26 Cal.3d 557, 576.) "Accordingly, we may not set aside the trial court's denial of the motion on the ground of the insufficiency of the evidence unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached by the court below." (*People v. Wong* (1973) 35 Cal.App.3d 812, 828.)

Although the California Court of Appeal decision does not cite to the relevant federal case law in reaching its decision regarding sufficiency of the evidence, such a citation is not required "so long as neither the reasoning nor the result of the state-court decision contradicts" Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2003) (per curiam). Accordingly, the question for us remains whether the state court in substance made an objectively unreasonable application of the *Winship* and *Jackson* standards for sufficiency of the evidence.

2254(d)(1); *Ponnapula v. Spitzer*, 297 F.3d 172, 179 (2d Cir. 2002); *Sanford v. Yukins*, 288 F.3d 855, 863 (6th Cir. 2002); *Piaskowski v. Bett*, 256 F.3d 687, 691 (7tn Cir. 2001); *Hurtado v. Tucker*, 245 F.3d 7, 16 (1st Cir. 2001).[13]

B.

In conducting our inquiry, we are mindful of "the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review." *Wright v. West*, 505 U.S. 277, 296-97 (1992) (plurality opinion); *cf. Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Herrera*, 506 U.S. at 400; *Engle v. Isaac*, 456 U.S. 107 (1982) ("The States possess primary authority for defining and enforcing the criminal law."). Our deference, however, is not without limit. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review.").

In recent years, the Supreme Court has held that a writ of habeas corpus based upon a claim of insufficient evidence was warranted when the state had presented no evidence that a defendant lacked a permit to operate a hazardous waste facility, a material element of the criminal offense. *Fiore v. White*, 531 U.S. 225, 226-29 (2001) (per curiam). In our Circuit, we have held that a writ of habeas corpus should have been granted to a petitioner who demonstrated that no reasonable jury could have found that false statements given under oath were material to an underlying court case, an element essential to sustaining his conviction for perjury. *Chein*, 373 F.3d at 993. More closely akin to the instant case, in *Piaskowski v. Bett*, the Seventh

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13. We note that this Circuit has not yet decided what standard applies to sufficiency of the evidence challenges under AEDPA. *See Chein*, 373 F.3d at 983; *Bruce v. Terhune*, 376 F.3d 950, 956-57 (9th Cir.2004) (per curiam). We conclude that the Supreme Court's analysis of AEDPA in *Williams* compels the conclusion that the state court's application of the Jackson standard must be "objectively unreasonable." 529 U.S. at 409, 120 S.Ct. 1495.

Circuit affirmed the grant of a writ of habeas corpus to a petitioner who had been convicted of first-degree murder under a conspiracy theory based upon evidence of alleged motive, statements implying knowledge of the murder, and the testimony of two witnesses that, if taken as true, placed the petitioner at the scene of both the murder and an earlier assault of the victim. 256 F.3d at 691-93. Although circuit decisions may be pertinent to the extent that they illuminate the meaning and application of Supreme Court precedents, *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir.2004), only "clearly established Federal law, as determined by the Supreme Court of the United States" can be the basis for relief under AEDPA, 28 U.S.C. § 2254(d). *Campbell v. Rice*, No. 99-17311, slip op. 5443, 5450 (9th Cir. May 20, 2005) (en banc).

[9] Although our sufficiency of the evidence review is grounded in the Fourteenth Amendment, we undertake the inquiry with reference to the elements of the criminal offense as set forth by state law. *Jackson*, 443 U.S. at 324 n. 16. Juan H. was found culpable of the first-degree murder of Luis Ramirez and the attempted first-degree murder of Sylvester Magdelano, in violation of California Penal Code sections 664 and 187, under a theory of aiding and abetting. Both parties agree that under California law "a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *People v. Beeman*, 35 Cal.3d 547 (1984).

[10] An aider and abettor must share in the principal's criminal purpose or intent. *Id.* at 1323-27; *see also People v. Campbell*, 25 Cal.App.4th 402 (1994) ("[I]n general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission."). The prosecution must establish intent with respect to the specific offense the defendant is alleged to have

aided and abetted; intent may not be established based upon "the . . . generalized belief that the defendant intended to assist and/or encourage unspecified 'nefarious conduct.'" *People v. Prettyman*, 926 P.2d 1013, 1024-25 (1996); *see also People v. Hickles*, 66 Cal.Rptr.2d 86, 93-94 (1997) (stating that aiding and abetting liability for murder does not attach when a defendant knew only of an assault without a deadly weapon or knew only of a planned argument, but not a planned assault).

Comparing these elements to the evidence in this case, viewed in the light most favorable to the prosecution, and all reasonable inferences that may be drawn from this evidence, we conclude that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. To survive a due process challenge here, the record of conviction must reflect sufficient evidence to allow any reasonable factfinder to conclude that Juan H.: 1) knew that Merendon planned to commit, with malice aforethought, the willful, deliberate, and premeditated murders of Ramirez and Magdelano, *see* Cal. Penal Code §§ 187, 189; 2) specifically intended to encourage or facilitate Merendon's unlawful conduct; and 3) affirmatively acted in a manner so as to aid, promote, encourage or instigate the murders. *See Beeman*, 674 P.2d at 1326; *see also Patterson*, 432 U.S. at 215 ("[A] State must prove every ingredient of an offense beyond a reasonable doubt . . .").

In affirming the conviction of Juan H., the California Court of Appeal discussed evidence of motive, conduct, flight and false alibi. With respect to motive, the California Court of Appeal noted that Juan H. had made gang gestures towards Magdelano months before the shooting and that Magdelano had punched Juan H. on one prior occasion. The court further determined that "Felix and the minor suspected Magdelano and Luis of shooting into their trailer." Turning to the offense conduct, the California Court of Appeal interpreted the record to reflect that:

> [T]he minor and Felix were together outside the trailer, and, upon seeing Magdelano and Luis, they both ran to a hiding place, where Felix retrieved a 36-inch shotgun. As Magdelano and Luis approached, the minor and Felix emerged together from hiding and confronted them. The minor stood somewhat behind Felix, in a position to see and provide back-up support. Felix did the talking and accused Magdelano and Luis of shooting at their trailer. Immediately after Luis responded, Felix shot him. Magdelano ran but fell and then heard a second shot.

Finally, the California Court of Appeal determined that Juan H. manifested consciousness of guilt because "[h]e and Felix fled together toward their trailer, and a short time later police intercepted the minor trying to leave the area with his family" and "when questioned by the police, the minor gave a false alibi: He was in the trailer and not present during the shooting." The California Court of Appeal concluded that, "the evidence of motive and consciousness of guilt is insufficient standing alone to prove the minor's culpability. However, when this evidence is considered together with his conduct and evidence of flight, we find ample basis to support a finding of culpability beyond a reasonable doubt."

[11] The California Court of Appeal decision affirming the conviction of Juan H. was an unreasonable application of the Fourteenth Amendment requirement that the prosecution present evidence sufficient to prove every element of a crime beyond a reasonable doubt. *See* 28 U.S.C. § 2254(d)(1); *In re Winship*, 397 U.S. at 365-68; *Jackson*, 443 U.S. at 319. The record contains manifestly insufficient evidence to support the necessary conclusions that Juan H. knew that Merendon planned to commit the first-degree murders of Ramirez and Magdelano, and that Juan H. acted in a way intended to encourage or facilitate these killings. Viewed in a light most favorable to the prosecution, the circumstantial evidence in this case does not permit any reasonable factfinder to sustain the delinquency

petition of Juan H. on the charges of aiding and abetting first-degree murder and attempted first-degree murder, as those crimes are defined by California law.

[12] As an initial matter, the trial record does not support a conclusion that Juan H. left the murder scene in common "flight" with Merendon. The undisputed evidence shows that Merendon ran to his car and drove to the home of Rubio, while Juan H. ran home to his family's trailer and was located there when the police arrived. No reasonable trier of fact could find evidence of criminal culpability in the decision of a teenager to run home from the scene of a shooting, regardless of whether the home was in the same general direction as the car of a fleeing suspect. Likewise, any rational factfinder would find little or no evidence of guilt in the fact that Juan H. attempted, along with the rest of his family, to leave his home as it was being surrounded by an angry mob of neighbors.

[13] With respect to the evidence of the false alibi, the determination of the California Court of Appeal that the untrue statements Juan H. made to the police reflected consciousness of guilt is bare conjecture. Juan H. might have made a false statement to law enforcement for any number of reasons, especially given that any statements he made as a witness would likely be used to prosecute his older brother, a member of his immediate family. Although we must draw all reasonable inferences in favor of the prosecution, a "reasonable" inference is one that is supported by a chain of logic, rather than, as in this case, mere speculation dressed up in the guise of evidence.

[14] With respect to motive, the record contains very little evidence that would allow a reasonable factfinder to infer that "the minor suspected Magdelano and Luis of shooting into their trailer." Although there was ample evidence that Merendon held this opinion, the prosecution was required to prove its case with respect to Juan H., and the determination that Juan H. believed that Magdelano and Ramirez had shot at his house was, again, unsupported speculation. The primary evidence of motive was that Juan H. made gang gestures at Magdelano during the

months before the shootings and that Magdelano had once punched Juan H. in the head and knocked him to the ground. Although these events provide evidence that there may have been interpersonal tensions between Magdelano and Juan H., they do not create a sufficiently strong inference of motive to allow a reasonable trier of fact to conclude beyond a reasonable doubt that Juan H. had reason to aid and abet first-degree murder.

[15] Finally, with respect to the alleged offense conduct, the record reflects no direct evidence that Juan H. had any idea that Merendon planned to assault or murder Magdelano and Ramirez. Further, the circumstantial evidence presented does no more than establish that a rational trier of fact could conclude that Juan H. knew his brother was armed and ready to confront Magdelano and Ramirez if the family and home of Juan H. were again threatened. That Juan H. stood behind his older brother after the family home had been attacked, even if he knew his brother was armed, does not permit the rational inference that he knew his brother would, without provocation, assault or murder the victims.[14]

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14. Both parties cite numerous California cases for us and argue that their facts and holdings govern the disposition of this habeas petition. *See, e.g., People v. Laster*, 61 Cal.Rptr.2d 680 (1997) (holding that the jury could conclude that defendant aided and abetted murder if it had concluded that defendant aided and abetted in the target offense of discharging a firearm from a motor vehicle because defendant could have foreseen murder under the circumstances); *Campbell*, 30 Cal.Rptr.2d 525 (holding that presence at scene of crime when defendant knew of victims' isolation, concerted action that continued during the robbery, and post-offense conduct in furtherance of the crime was sufficient evidence); *People v. Chagolla*, 193 Cal.Rptr. 711 (1983) (holding that there was sufficient evidence that defendant who rode with principal, shouted gang slogans at victims and fled with principal aided and abetted murder); *People v. Moore*, 260 P.2d 1011, 1013-14 (1953) (holding that a person who "was in the position of a lookout [,] . . . was in the company of the other defendants before the crime was committed, remained with them during the robbery, fled with them from the [crime scene], and when arrested in company with the others had the knife and stolen bills in his possession" aided and abetted the crime). These questions

It is not enough for the prosecution to demonstrate that Juan H. knew that some criminal activity was afoot on the night of March 24, 1999 or that Merendon planned to confront Ramirez and Magdelano while holding a firearm. Rather, the element of knowledge must be proven with respect to first-degree murder and attempted first-degree murder, the specific crimes Juan H. was alleged to have aided and abetted. *See Beeman*, 199 Cal.Rptr. 60, 674 P.2d at 1326. Even if we were to assume the element of knowledge, the record does not reflect any evidence that Juan H. intended, through his actions, to assist Merendon in committing first-degree murder. Juan H. did not do or say anything before, during or after the shootings from which a reasonable factfinder could infer an intent or purpose to aid and abet in the murder of Ramirez and the attempted murder of Magdelano. Nor could any factfinder reasonably conclude that, by standing, unarmed, behind his brother, Juan H. provided "backup," in the sense of adding deadly force or protecting his brother in a deadly exchange.

[16] Speculation and conjecture cannot take the place of reasonable inferences and evidence—whether direct or circumstantial—that Juan H.—through both guilty mind and guilty act—acted in consort with Merendon. In this case, after resolving all conflicting factual inferences in favor of the prosecution, *see Jackson*, 443 U.S. at 326, it is only speculation that supports a conclusion that Juan H. knew that Merendon planned to commit the first-degree murders of Ramirez and Magdelano, and that Juan H. took some action intended to

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of California law, however, have been fully litigated on direct and habeas review in the California courts and are not properly subject to federal habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Stanton v. Benzler*, 146 F.3d 726, 728 (9th Cir.1998). We look to California law only to establish the elements of aiding and abetting and then turn to the federal question of whether the California Court of Appeal was objectively unreasonable in concluding that sufficient evidence supported the delinquency petition. *Jackson*, 443 U.S. at 324 n. 16.

encourage or facilitate Merendon in completing the killings.[15] Such a lack of evidence violates the Fourteenth Amendment guarantee that an accused must go free unless and until the prosecution presents evidence that proves guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. at 365-68.[16]

REVERSED AND REMANDED WITH INSTRUCTIONS TO GRANT A WRIT OF HABEAS CORPUS

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15. In addition, under the California Penal Code, "[t]he liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages." *Beeman*, 674 P.2d at 1326. To obtain a conviction under this theory, the jury must find the elements of aiding and abetting with respect to the target crime and "must also find that (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." *Prettyman*, 926 P.2d at 1020. The state argues that Juan H. is liable for the natural and probable consequences of an assault with a deadly weapon on Ramirez and an attempted assault with a deadly weapon on Magdelano. We reject this argument. The reasons for finding insufficient evidence to support a conviction for aiding and abetting first-degree homicide are equally applicable to assault with a deadly weapon, as that crime is defined under California Penal Code section 245. *Cf. Windham v. Merkle*, 163 F.3d 1092, 1101-02 (Cir.1998). The state does not argue that Juan H. is liable for first-degree murder because he aided and abetted the misdemeanor offense of drawing, exhibiting, or using a firearm or deadly weapon under California Penal Code section 417. We accordingly do not consider this claim and any constitutional problems that it may present.

16. For all that is shown in the record, it appears that Merendon may not have been brought to justice for the shooting death of Ramirez. But, if so, the failure of law enforcement to apprehend a principal does not license the state to impute such serious guilt to an alleged aider and abettor absent evidence that meets the constitutional requirement that every element of a crime be established beyond a reasonable doubt with respect to the accused.

APPENDIX B

Filed 2/17/04

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JUAN H.,	)	
Petitioner,	)	**No. 02-2018 CW**
	)	
v.	)	**ORDER DENYING**
	)	**PETITION FOR WRIT**
JEFF HARADA,	)	**OF HABEAS CORPUS**
Superintendent, Preston	)	
Youth Correctional	)	
facility,	)	
Respondent.	)	

Petitioner Juan H., a State prisoner currently incarcerated at Preston Youth Correctional Facility in Ione, California, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed an answer and Petitioner has filed a traverse. Having considered all of the papers filed by the parties, and good cause appearing, the Court DENIES the petition for a writ of habeas corpus.

BACKGROUND

I. Procedural History

On March 29, 1999, a petition was filed in Monterey Juvenile Court alleging that Petitioner committed premeditated murder in violation of California Penal Code § 187 and premeditated attempted murder in violation of California Penal Code §§ 664 and 187. The petition also alleged that Petitioner, though not personally armed, knew that another principal was personally armed with a firearm, in violation of California Penal Code § 12022(d). On May 18, 1999, a contested jurisdictional hearing commenced. On May 21, 1999, the court sustained all

allegations in the petition. On July 28, 1999, Petitioner was committed to the California Youth Authority for a period not to exceed thirty-four years and eight months to life.

On December 11, 2000, the California court of appeal affirmed the judgment. On January 9, 2001, the court of appeal modified the opinion and denied rehearing. On February 21, 2001, the California Supreme Court denied review. On October 31, 2001, the California Supreme Court issued a postcard denial of Petitioner's petition writ of habeas corpus.

II. Factual History

The following facts are taken from the December 11, 2000 opinion of the California court of appeal, as modified by the January 9, 2001 order.

> Sylvester Magdelano lived in trailer number 23 at a trailer park in Salinas. In the fall of 1998, the minor,[1] age 15, and his family, including his older brother Felix, age 22, moved into trailer number 18. There were problems between the minor's family and other residents of the trailer park. According to Magdelano, the minor "would always throw gang signs" and try to "stare [Magdelano] down." Magdelano attributed this conduct to the fact that while Magdelano was affiliated with a Norteno group, the "Santa Rita Boys," and most of those in the trailer park socialized with Nortenos, the minor's family appeared to associate with rival Surenos.
>
> Magdelano testified that around March 10, 1999, he went up to the minor, told him to stop throwing gang signs, and then punched him in the face. The minor fell to the ground and did not respond. Later, Magdelano and three friends, including Luis Ramirez, talked to Felix and the minor's father about avoiding problems.

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1. The appellate court refers to Petitioner as "the minor."

On March 24, 1999, at around 9:00 p.m., someone fired shots at the minor's trailer and a vehicle parked outside. The police responded and spoke to the family, but no one had seen the shooter. Later, at around 10:30 p.m., Magdelano and his friend Luis were returning from a gym near the trailer park. They saw the minor's family outside their trailer. The minor and Felix were talking to someone in a white truck. As Magdelano and Luis got closer, the minor and Felix suddenly ran into the trailer park and hid. Neither appeared to be carrying anything. Magdelano and Luis proceeded. When they were closer to trailer 18, the minor and Felix emerged from behind a parked vehicle and walked to them. The minor stood next to but a little behind Felix. Felix asked if they were the ones who "shot up his pad." When Luis responded that he did not know what Felix was talking about, Felix lifted a double-barreled shotgun from his side and fired at Luis. FN 2. Luis fell down. Magdelano immediately stated to run, but after a short distance, he slipped and fell. He heard a second shot. He then saw the minor and Felix flee toward their trailer. The minor ran inside, and Felix got into a vehicle and drove away. Magdelano ran home and had his father call "911." He then returned to Luis and waited for paramedics to arrive.

FN 2: Shortly after the shooting, Magdelano variously said that Felix pulled the gun from his side or from his waistband. At a previous court hearing, Magdelano said Felix pulled the shotgun from the front but he was not certain.

When Officer Richard Anderson of the Salinas Police Department arrived at the scene, a large, hostile crowd had gathered, and the minor and his family, except for Felix, were in a van, backing out of the driveway. Anderson ordered them to stop. Officer Richard Maldanado of the

Salinas Police Department searched the area and found two spent shotgun shells near a vehicle parked near trailer 22.

Officer Joseph Gunter of the Salinas Police Department spoke to the minor that night. The minor said he was inside his trailer when he heard some arguing outside and the sound of a gun firing. He denied being outside at the time of the shooting. The next day, Gunter interviewed the minor at the police station. The interview was videotaped. At the hearing, Gunter testified that during the taped interview, the minor changed his story, saying first that he was in the trailer, then admitting he was outside, and then returning to his first story.

The Defense FN 3.

Ricardo Rubio testified that on the night of the shooting, his friend Felix came to his house. He was pale and scared. He had a 36-inch shotgun with him. He said he had shot one person and fired at another. He explained that when the victim said, "what are you going to do, shoot me or what," he pulled the gun and shot him. Felix did not mention that the minor was with him.

FN 3: After the State completed its case, the minor moved to dismiss the petition. The motion was denied.

Rebuttal by the State

Magdelano testified that he told the officers the shotgun came from Felix's side, not from his front or from inside his pants. He was certain Felix had the gun at his side and that the minor could have seen it from where he was standing. Magdelano also testified that the minor was not armed and did not say or do anything during the shooting.

The court admitted and played the videotape of the minor's interview with Gunter.

Billy Martinez lives in the trailer park and was friendly with Magdelano and Luis. He testified that on the night of the shooting, he heard two shots and ran outside. He saw Luis on the ground and Magdelano running for help. He saw the minor with his family standing next to their vehicle. The minor stared menacingly at him, imitated a gun with his finger, and pointing it at Martinez said, "You guys better watch it." Martinez said he told this to his vice-principal and Gunter.

Rebuttal by the Minor

John Gutierrez, the vice-principal at Martinez's school, and Gunter testified that they spoke to Martinez and he did not mention the minor's gesture or remark.

Ex. E. at 2-4.

LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, a district court may grant a petition challenging a State conviction or sentence on the basis of a claim that was reviewed on the merits in State court only if the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). It is error for a federal court to review *de novo* a claim that was decided on the merits in State court. *See Price v. Vincent*, 123 S. Ct. 1848, 1852-55 (2003) (reversing judgment of Sixth Circuit granting habeas relief on *de novo* review where claims did not meet standards for relief under § 2254 (d)(1)).

Habeas relief is warranted only if the constitutional error at

issue is structural error or had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *see, e.g., DePetris v. Kuykendall*, 239 F.3d 1057, 1061 (9th Cir. 2001) (exclusion of evidence was an unreasonable application of federal law and had a substantial and injurious effect on verdict), *but cf. Avila v. Galaza*, 297 F.3d 911, 918 n.7 (9th Cir. 2002) (*Brecht* harmless error review not necessary with respect to ineffective assistance of counsel claims, because the prejudice analysis under *Strickland v. Washington*, 466 U.S. 668 (1984) is complete in itself).

"Clearly established federal law, as determined by the Supreme Court of the United States" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Although a State court decision may no longer be overturned on habeas review simply because of a conflict with circuit-based law, circuit decisions may still be relevant as persuasive authority to determine whether a particular State court holding is an "unreasonable application" of Supreme Court precedent or to assess what law is "clearly established." *Clark v. Murphy*, 331 F.3d 1062, 1070-71 (9th Cir. 2003); *Duhaime v. Ducharme*, 200 F. 3d 597, 600 (9th Cir. 2000) .

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. "Avoiding these pitfalls does not require citation of our cases — indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (emphasis in original); *Powell v. Galaza*, 328 F.3d 558, 562-63 (9th Cir. 2003) (accord) (on remand from United States Supreme Court).

When a State court's decision is "contrary to" clearly established Supreme Court law, habeas relief may be granted if the State court's decision on the issue is erroneous — it need not be clearly erroneous — and the constitutional error had a substantial and injurious effect on the jury's verdict. *Early*, 537 U.S. at 11.

A "run-of-the-mill state-court decision" that correctly identifies the controlling Supreme Court framework and applies it to the facts of a prisoner's case "would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406. A State court's *Strickland* analysis, for example, generally does not fall within the "contrary to" clause. *Id.* Such a case — where the State court applies *Strickland* — should be analyzed under the "unreasonable application" prong of § 2254(d). *Weighall v. Middle*, 215 F.3d 1058, 1062 (9th Cir. 2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 412-13. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams*, 529 U.S. at 411; *accord Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam) ("unreasonable" application of law is not equivalent to "incorrect" application of law).

A federal habeas court may grant the writ if it concludes that the State court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Where a State court factual finding has been proven incorrect by clear and convincing evidence presented in the State court proceeding, *see*

28 U.S.C. § 2254(e)(1), that finding is also an unreasonable determination of the facts pursuant to § 2254(d)(2). *Wiggins v. Smith*, 123 S. Ct. 2527, 2539 (2003). Where a State court has not made a necessary factual finding, the reviewing court determines the fact *de novo*. *Id.* at 2540.

A district court must presume correct any determination of a factual issue made by a State court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This presumption is not altered by the fact that the finding was made by a State court of appeals, rather than by a State trial court. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001). For purposes of § 2254(e)(1), factual issues are defined as "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Coombs v. Maine*, 202 F.3d 14, 18 (1st Cir. 2000) (citations and internal quotation marks omitted).

In determining whether the State court's decision is contrary to, or involved an unreasonable application of, clearly established federal law, a federal court looks to the decision of the highest State court to address the merits of a petitioner's claim in a reasoned decision. *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir. 2000). If the State court only considered State law, the federal court must ask whether State law, as explained by the State court, is "contrary to" clearly established governing federal law. *Lockhart v. Terhune*, 250 F.3d 1223, 1230 (9th Cir. 2001). If the State court, relying on State law, correctly identified the governing federal legal rules, the federal court must ask whether the State court applied them unreasonably to the facts. *Id.* at 1232.

The standard of review under AEDPA is somewhat different where the State court gives no reasoned explanation of its decision on a petitioner's federal claim and there is no reasoned lower court decision on the claim. In such a case, a review of the record is the only means of deciding whether the State

court's decision was objectively reasonable. *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Greene v. Lambert*, 288 F.3d 1081, 1088 (9th Cir. 2002); *Bailey v. Newland*, 263 F.3d 1022, 1028 (9th Cir. 2001); *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). When confronted with such a decision, a federal court should conduct "an independent review of the record" to determine whether the State court's decision was an unreasonable application of clearly established federal law. *Himes*, 336 F.3d at 853; *Delgado*, 223 F.3d at 982.

DISCUSSION

Petitioner presents three grounds for relief: (1) violation of his Fourteenth Amendment due process rights by the State court's finding that Petitioner was culpable without substantial evidence that he was an aider and abettor to murder and attempted murder; (2) ineffective assistance of trial counsel because counsel failed to object to the admission of Petitioner's statements during a custodial interrogation on the grounds that the statements were coerced; and (3) violation of his Fifth and Fourteenth Amendment rights as explicated in *Miranda v. Arizona*, 384 U.S. 436 (1966) on the ground that the court failed to exclude statements Petitioner made in his custodial interrogation despite the lack of a knowing, intelligent and voluntary waiver of his right to remain silent.

I. Substantial Evidence

A. Legal Standard

To determine if there is sufficient evidence to support a criminal conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . [A] federal habeas court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of

fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson v. Virginia*, 443 U.S. 307, 318-19, 326 (1979). California's standard for reviewing a sufficiency of the evidence claim is the same as that explicated in *Jackson*. *See People v. Mayfield*, 14 Cal. 4th 668, 767 (1997) (citing *Jackson* for sufficiency of evidence rule); *see also People v. Mincey*, 2 Cal. 4th 408, 432 (1992) (the court "must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt."). In *People v. Johnson*, 26 Cal. 3d 557, 576 (1980), the California Supreme Court compared the *Jackson* sufficiency of the evidence standard to California's standard and concluded that the standards were the same.

Sufficiency claims are analyzed using the elements of the criminal offense as defined by State law. *Jackson*, 443 U.S. at 324 n.16.

At trial, the State argued that Petitioner was guilty of murder and attempted murder under an aiding and abetting theory. Reporter's Transcript (RT) at 753. In California, to be found guilty of aiding and abetting, a person must act "with (1) knowledge of an unlawful purpose of the perpetrator and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense; (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *People v. Beeman*, 35 Cal. 3d 547, 561 (1984). A person is also culpable of aiding and abetting if the "confederate committed an offense other than the target crime, and . . . the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." *People v. Prettyman*, 14 Cal. 4th 248, 262 (1996). Presence at the scene of the crime is insufficient to prove aiding and abetting; rather, it is a factor which, together with others, could support a finding that a defendant shared the specific

intent of the perpetrator. *Beeman*, 35 Cal. 3d at 559-60. Sharing the perpetrator's intent does not mean that the aider and abettor must be prepared to commit the offense should the perpetrator fail to do so, nor does it mean that the aider and abettor must seek to share the fruits of the crime. *Id.* at 560. Rather, it means that when the aider and abettor knows the full extent of the perpetrator's criminal purpose, he or she gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. *Id.*

In general, motive or opportunity is not enough to establish that a party is guilty of committing a crime. *People v. Hall*, 41 Cal. 3d 826, 833 (1986). "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *Id.* Lack of credibility is not evidence of guilt, although it may form the basis for unfavorable inferences against the defendant. *Blakeslee*, 2 Cal. App. 3d at 839. Although "a false alibi tends to establish a consciousness of guilt, the logical force of this deduction is weakened when there is some plausibility to the defendant's subsequent explanation of the reason for the falsehood. *Id.* (defendant's explanation that she lied about her actions on the night of a murder in order to protect her brother was plausible).

B. Analysis

In his direct appeal, Petitioner challenged the trial court's denial of his motion to dismiss at the close of the State's case in chief. The court reviewed the denial of the motion to dismiss under the substantial evidence test elucidated in *Johnson*, 26 Cal. 3d at 576. The court pointed to the following evidence to find that there was sufficient evidence to support the trial court's judgment that Petitioner was liable for murder and attempted murder as an aider and abettor.

> The record supports a finding the minor and Felix had a motive to commit the offenses. After the minor moved to the trailer park, he began throwing Sureno gang signs at

the Norteno Magdelano. Magdelano, in turn, punched the minor in the face, knocking him down. Thereafter Magdelano and Luis spoke to the minor's father and Felix about avoiding problems. However, one night a couple of weeks later, someone shot at the minor's trailer, and Felix suspected Magdelano and Luis. The record further reasonably supports an inference that the minor and Felix acted in concert in confronting Magdelano and Luis and that the minor knew Felix had a shotgun and planned to assault or shoot them with it. In particular, the minor and Felix were together outside the trailer, and, upon seeing Magdelano and Luis, they both ran to a hiding place, where Felix retrieved a 36-inch shotgun. FN 4

FN 4: Magdelano testified that he did not see Felix or the minor carrying anything, let alone a 36-inch shotgun, when they first ran and hid. Nor did he notice that Felix had trouble running at that time. This evidence supports an inference that Felix retrieved the gun from their hiding place.

As Magdelano and Luis approached, the minor and Felix emerged together from hiding and confronted them. The minor stood somewhat behind Felix, in a position to see and provide back-up support. Felix did the talking and accused Magdelano and Luis of shooting at their trailer. Immediately after Luis responded, Felix shot him. Magdelano ran but fell and then heard a second shot.

Last, the court could reasonably find that the minor's conduct after the shooting manifested his consciousness of guilt. He and Felix fled together toward their trailer, and a short time later police intercepted the minor trying to leave the area with his family. (*See* CALJIC No. 2.52 [flight may reflect consciousness of guilt].) Moreover, when questioned by the police, the minor gave a false alibi:

He was in the trailer and not present during the shooting. (*See* CALJIC No. 2.03 [willfully false statement to police may reflect consciousness of guilt].)

In short, the court could reasonably find that both the minor and Felix intended to confront Magdelano and Luis and shoot, or at the least assault, them with the shotgun. The court could also reasonably find that the minor intended to promote, assist, and facilitate the intended attack. FN 5

FN 5: Even if we assume that Felix and the minor intended only to assault Magdelano and Luis with the shotgun, the court could find the minor culpable for the murder and attempted murder based on a finding that both offenses were the natural and probable consequences of an assault he intended to aid and abet. We recognize that unlike murder, attempted murder requires a specific intent to kill. However, the court could reasonably infer that whatever may have been Felix's mental state before he murdered Luis, after he did so he decided to kill Magdelano too. Thus, both Felix's specific intent to kill and the attempted murder could reasonably be deemed the natural and probable consequences of the assault. (Citations omitted).

The minor notes that when he and Felix were standing before Magdelano and Luis, he did not do or say anything to encourage, assist, or facilitate Felix. However, the minor overlooks his conduct in concert with Felix prior to and after the shooting, which gives purpose and intent to his silence and position and rebuts any notion that he was just an unknowing and innocent bystander.

The minor argues that any inference of a consciousness of guilt from his flight is purely speculative because Felix fled in a car and the minor ran home. He submits that his

flight was no more indicative of a consciousness of guilt than Magdelano's flight from the scene. We are unpersuaded. Both the minor and his brother ran in the same direction. Understandably, Felix, who had the shotgun, decided to flee the area by car. Magdelano, on the other hand, ran to avoid injury and get help for Luis. Under the circumstances, the minor's flight was more akin to that of Felix than that of Magdelano.

The minor argues that there is no evidence he thought Magdelano and Luis were the persons who shot at his trailer, and therefore no evidence he had a motive to attack them. He further argues that he had a reason to give a false alibi-to protect Felix. Thus, his alibi does not reasonably reflect his consciousness of guilt. He also claims that any evidence of motive and consciousness of guilt is insufficient to establish his culpability.

We disagree that there was no evidence of motive. As noted, Magdelano punched the minor. Felix and the minor suspected Magdelano and Luis of shooting into their trailer. Moreover, the minor never told anyone he lied to protect Felix. Nor did he provide any other plausible reason for giving a false alibi. Thus, the alibi reasonably reflects a consciousness of guilt. We agree that evidence of motive and consciousness of guilt is insufficient standing alone to prove the minor's culpability. However, when this evidence is considered together with his conduct and evidence of flight, we find ample basis to support a finding of culpability beyond a reasonable doubt.

Last, the minor argues that there was no evidence to support a finding that he or Felix attempted—i.e., specifically intended—to kill Magdelano. He notes that after Magdelano fell, he was not hit by shotgun pellets and did not hear any pellets land near him. Moreover, when he

looked up, the minor and Felix were fleeing. Last, we note that police found the empty shells closer to Luis, and pellets were found in his wound.

As noted above, the court could reasonably find that whatever may have been the minor and Felix's initial intention upon confronting Magdelano and Luis, after Felix shot and killed Luis, he intended his second shot to kill Magdelano. (See also fn.5, *ante*.) That Magdelano was not hit and did not hear pellets does not conclusively establish that Felix did not fire at him. Magdelano had already fled some distance and fallen down. Moreover, the evidence indicates that Luis fell down after being shot once. He had only one shotgun wound. And there is no evidence that the number of pellets found in his wound exceeded the number contained in a single shell.

In sum, we find that the State produced sufficient evidence to sustain the petition, and therefore, the court properly denied the minor's motion to dismiss. FN 6

FN 6: In light of our analysis and conclusion, we reject the minor's separate contention that there is insufficient evidence presented at the entire jurisdictional hearing to support the court's order. The additional evidence presented during the rebuttal only strengthened the State's case. As noted, Martinez testified that the minor made a menacing gesture and threatened him shortly after the incident. And the defense witness Rubio testified that Felix told him he shot at both Luis and Magdelano but did not know whether he hit Magdelano.

Ex. E. at 5-8.

Petitioner argues that, as a matter of law, facts on which court of appeal relied were insufficient to justify a rational finder of

fact in finding that guilt had been proven beyond a reasonable doubt. Petitioner primarily relies on the fact that the only testifying eye witness to the shooting was Magdelano who stated that Petitioner did nothing and said nothing to indicate he was participating in the crime or encouraging or assisting Felix. Petitioner points out that because there is no direct evidence that he aided and abetted Felix, the appellate court relied on evidence of motive, flight and his statements to the police to show consciousness of guilt. Petitioner argues that there was insufficient evidence to support the appellate court's conclusion on each of these theories.

A. Motive

First, Petitioner argues that there was no showing he had a motive to kill or assault Ramirez and Magdelano because although he had had difficulties with them in the past, they had resolved their differences weeks before the incident. Furthermore, Petitioner argues, no evidence connected the past incidents to the shooting of Petitioner's trailer, nor was there a showing that Petitioner believed Ramirez or Magdelano were responsible for it.

To support his theory that Petitioner had resolved their past differences with Ramirez and Magdelano, Petitioner cites RT 14-15 and 34. The first citation is to Magdelano's testimony that a few weeks before the shooting, Magdelano went over to Petitioner, told Petitioner, "You better stop throwing signs at me," and then punched Petitioner so hard Petitioner fell to the ground. RT at 14. Some time after Magdelano punched Petitioner, but before the shooting, Magdelano and his friends Martin and Luis went to Petitioner's trailer to tell him that "we don't want no problems." RT at 15. Martin talked to Petitioner's father and older brother, Felix. RT at 16. When he left Petitioner's trailer with Martin and Luis, Magdelano assumed the problem had been resolved. *Id.* The second citation, RT 34, is Magdelano's cross-examination in which he repeats that he punched Petitioner hard enough that he fell to the

ground.

This testimony does not indicate that Petitioner considered the matter resolved. As indicated from the testimony, after Magdelano punched Petitioner, Magdelano and his friends went to Petitioner's house to resolve things between them, but the only conversation that took place was between Magdelano's friend Martin and Petitioner's father and brother, Felix. Petitioner did not take part in the conversation; thus, there is no evidence regarding how Petitioner reacted to the conversation. Further, the evidence only shows that after the conversation Magdelano considered the matter to be resolved; there is no evidence that Petitioner felt the matter was resolved.

Although Petitioner is correct that there is no evidence connecting the past incidents involving Magdelano to the shooting of Petitioner's trailer, there is evidence that Felix thought Magdelano and Luis were responsible for the shooting. *See* RT at 24 (Magdelano's testimony that Felix and Petitioner came out from between two trailers and Felix asked Magdelano and Luis if they were the ones that shot up his trailer). The facts that Petitioner and Felix were together when they saw Magdelano and Luis enter the trailer park, that Petitioner then ran somewhere out of sight with Felix, and that Petitioner accompanied Felix to and during his confrontation with Magdelano and Luis are evidence that Petitioner believed as his brother did that Magdelano and Luis were responsible for shooting at his house. Taken together, Magdelano's punching Petitioner and Felix and Petitioner's assumption that Magdelano and Luis shot at their trailer earlier that evening comprise strong motivation for Petitioner's intent to kill or assault Magdelano and Luis. The appellate court did not unreasonably determine these facts sufficient in light of the evidence presented.

B. Joint Action

Petitioner argues that there is a complete lack of evidence to indicate he acted jointly with Felix. Specifically, Petitioner contends:

> Although [Petitioner] accompanied by his brother, there is no evidence of a joint action to commit crimes. The Court of Appeal assumed [Petitioner] and [Felix] saw [Luis] and Magdelano approach the trailer home and this prompted [Petitioner] and his brother to run to a 'hiding place' from where they retrieved a shotgun. [Petitioner] then followed his brother when they emerged from between the two trailer homes and [Felix] confronted [Luis] and Magdelano. The factual premises relied upon by the court for its conclusions were not supported by the evidence. Magdelano testified simply that when he and [Luis] approached the trailer home, he saw [Petitioner] and [Felix] standing outside and then running into the trailer park where he could no longer see them. There was no evidence [Petitioner] and [Felix] saw [Luis] and Magdelano or were aware of them. Further, there was no evidence they ran to a 'hiding place;' they simply ran to somewhere beyond Magdelano's field of vision. Nor was there evidence they retrieved a shotgun from this 'hiding place.' This conjecture is based on Magdelano's observation that he did not see them carry anything or have difficulty running when they ran toward the trailer home. However, Magdelano did not see them carry anything when they emerged from between the trailer homes, and he did not mention their gait was any different. Although [Felix's] shotgun was long, there is no indication anyone — [Luis], Magdelano, or [Petitioner] — ever saw it before [Felix] started shooting.

Petition at 12-13.

Although Petitioner is correct that there is no direct evidence that he aided or abetted Felix, a court reviewing a judgment for sufficiency of the evidence "must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." *Mincey*, 2 Cal. 4th at

432. Petitioner is also incorrect that there was no evidence that Petitioner and Felix ran to a hiding place. Magdelano testified as follows:

Q: Where were you when you noticed Felix and [Petitioner] talking to the guy in the white truck?
A: We were like halfway across the street.
Q: Did that grab your attention?
A: Yeah.
Q: As you watched them, what did you see them do?
A: I seen them run.
Q: When you say "them," who was there?
A: It was [Petitioner] and his brother.
Q: Where did they run to?
A: To go hide.
Q: Where did they run, specifically?
A: They ran like inside the trailer park. I don't know. I just seen them run.

RT at 22.

Although Magdelano's testimony that Petitioner and Felix went to hide may have been based only on his assumption, no contradictory evidence was presented. The court could reasonably rely on Magdelano's testimony to find that Petitioner ran and hid with Felix when they saw Magdelano and Luis entered the trailer park. Similarly, although there was no direct evidence that Felix retrieved a shotgun from the "hiding place," the court could reasonably conclude, based on Magdelano's testimony that he did not see a shotgun in Felix's hand when he ran, RT at 29, and that Felix had a shotgun when he confronted Magdelano and Luis, that Felix retrieved the shotgun from some place close by between the time Magdelano first saw Felix and the time Felix confronted him. Because Petitioner does not dispute that Felix had the shotgun with him when he eventually confronted Magdelano and Luis he must be arguing that Felix had the shotgun before he and Petitioner ran "to hide." Petitioner implies that this scenario is less likely to support the

conclusion that he was aware that Felix had a shotgun with him when Felix eventually confronted Magdelano and Luis. Perhaps if the gun were a small revolver, Petitioner's theory would be supportable. But the gun Felix used was a 36-inch shotgun. It would be very unlikely, whether Felix had the shotgun with him originally or whether he retrieved it from a hiding place, that Petitioner, who was with Felix during the entire time these events unfolded, would be unaware that Felix was in possession of a shotgun. Furthermore, Magdelano's testimony that Felix pulled the shotgun from Felix' right side, which was the side closest to where Petitioner was standing in relation to Felix, *see* RT at 29, supports the conclusion that Petitioner knew Felix had a shotgun with him when he confronted Magdelano and Luis.[2/] Additionally, the fact that Petitioner accompanied Felix from the time Magdelano spotted Petitioner and Felix standing next to the white Bronco to the time Felix confronted Magdelano and Luis is evidence that Petitioner was acting in conjunction with Felix. The inferences of the appellate court were reasonably drawn from the evidence in the record.

C. Flight

Petitioner argues that his and Felix's flight did not indicate a joint operation because Felix ran to his car and Petitioner ran home and Petitioner's desire to be with his parents after witnessing a traumatic event could hardly demonstrate consciousness of guilt.

The fact that Petitioner and Felix ran to two different places might indicate they did not plan a mutual getaway. However, the appellate court also relied on the fact that, a short time after the shooting, police intercepted Petitioner trying to leave the

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2. The appellate court was aware that shortly after the shooting, Magdelano said that Felix pulled the gun from his side or from his waistband and at a previous court hearing, Magdelano had said Felix pulled the shotgun from the front, but he was not certain. The appellate court chose to resolve this conflicting testimony in favor of the prosecution, as it was required to do under *Jackson*.

area with his family, as a factor demonstrating his consciousness of guilt.

D. Statements to Police

Petitioner argues that because lack of credibility is not evidence of guilt, the court inappropriately relied to find consciousness of guilt on the fact that he gave a false alibi to the police. Petitioner provides two reasons for his false alibi: (1) directly after the shooting, he was visibly upset and unable to discuss the incident; and (2) he wanted to protect his brother.

Officer Joseph Gunter testified that on the night of March 24, 1999, he responded to the shooting incident at the trailer park. RT at 68. At some point, he went to Petitioner's trailer and questioned him about the shooting. *Id.* Officer Gunter testified that Petitioner said that "he had been inside of his trailer and that while in there he heard people arguing and noises and then he heard a loud boom like some kind of weapon going off, and that he had waited a few minuted inside of his trailer, and that he had come out and observed someone to be lying in the driveway area." RT at 69. The next day, when Petitioner was interviewed at the police station, he persisted in denying that he had been present at the shooting. RT at 70.

Petitioner's rationale for his false alibi is not borne out by the record. First, there is no evidence in the record that Petitioner was motivated to give a false alibi to protect his brother. Second, although Officer Gunter responded "yes" to defense questions suggesting that the shooting of Luis would be a "pretty traumatic experience for anybody," and "particularly, a 15 year old kid that's maybe never seen that before," Officer Gunter never testified that Petitioner was so visibly upset that he was unable to discuss the incident.

Therefore, the appellate court's conclusion that Petitioner's false alibi reflected consciousness of guilt was unreasonable.

In summary, the appellate court's overall conclusion that the trial court "could reasonably find that both the minor and Felix intended to confront Magdelano and Luis and shoot, or at least assault, them with the shotgun" was itself a reasonable

interpretation of the record evidence. As stated by the Supreme Court, "a federal habeas court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 318-19. The appellate court's conclusion that sufficient evidence supported the judgment was not an unreasonable application of federal law nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Therefore, Petitioner's request for relief based on insufficient evidence is denied.

II. Ineffective Assistance of Trial Counsel

Petitioner claims his counsel rendered ineffective assistance because she did not object to the admission of Petitioner's statements made during his custodial interview on the ground that they were coerced.

A. Legal Standard

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.* Under *Strickland*, to demonstrate ineffective assistance of counsel, a defendant must prove that his counsel's assistance was deficient and that the deficient assistance prejudiced his defense. 466 U.S. at 687. The *Strickland* framework for analyzing ineffective assistance of counsel claims is considered to be "clearly established Federal law as determined by the Supreme Court of the United States" for the purposes of 28 U.S.C. § 2254(d) analysis. *Williams*, 529 U.S. at 404-08.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors

so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. The defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. A habeas petitioner has the burden of showing through evidentiary proof that counsel's performance was deficient. *Toomey v. Bunnell*, 898 F.2d 741, 743 (9th Cir.), *cert. denied*, 498 U.S. 960 (1990).

Second, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 688. The test for prejudice is not outcome-determinative, i.e., the defendant need not show that the deficient conduct more likely than not altered the outcome of the case; however, a simple showing that the defense was impaired is also not sufficient. *Id.* at 693. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. In *Strickland*, the Supreme Court stated, "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in he same order or even to address both components of the inquiry if he defendant makes an insufficient showing on one." *Id.* at 697; *see also Williams v. Calderon*, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995) (courts need not determine whether counsel's performance was deficient before examining prejudice suffered by defendant as result of alleged deficiencies); *Siripongs v. Calderon*, 133 F.3d 132, 737 (9th Cir. 1998) (unnecessary for federal court considering habeas

ineffective assistance claim to address prejudice prong of *Strickland* test if petitioner cannot establish incompetence under first prong).

A State court's *Strickland* analysis should be analyzed under the "unreasonable application" prong of § 2254(d)(1). *Weighall v. Middle*, 215 F.3d 1058, 1062 (9th Cir. 2000).

B. Analysis

Petitioner argued on direct appeal that during the interview at the police department the day after the shooting, Officer Gunter "relentlessly pressured him and employed a variety of improper psychological ploys that elicited an in incriminating admission that he was present with Felix during the shooting" and that counsel rendered ineffective assistance in failing to object to his statement as involuntary. Ex. E at 12. The appellate court rejected the claim on three grounds: (1) the record did not disclose why counsel declined to challenge the statement as involuntary; (2) counsel's failure to object was not deficient conduct; and (3) the failure to object was not prejudicial.

Petitioner points out that when he filed his petition for writ of habeas corpus with the California Supreme Court, he included a declaration from trial counsel stating there was no tactical reason for her failure to object to the admission of Petitioner's statements. The Supreme Court summarily denied the petition without comment. Citing *Delgado*, 223 F.3d at 982, Petitioner argues that because the California Supreme Court issued a postcard denial of his claim that was supported by evidence that had not been submitted on direct appeal, this Court must give no deference to the State court opinion.

Petitioner's new evidence consisting of trial counsel's declaration would affect only the first ground for denial given by the appellate court. However, the appellate court's second and third grounds for denial, that counsel's failure to object was not deficient and was not prejudicial, are not affected by the submission of counsel's declaration. This Court will address the prejudice ground for denial and must defer to the State court's denial of Petitioner's claim on this ground.

The appellate court concluded that the taped interview was exculpatory. Ex. E at 13. It noted that, in the interview, the minor insisted that he was inside the trailer when the shooting occurred and not with Felix. Although at one point he appeared to acquiesce to an assertion by Gunter that he was outside, he later adamantly denied being outside, and when accused of changing his story, he denied ever saying that he had been outside. Thus, the tape speaks for itself on whether the minor gave conflicting accounts of where he was that night. And, notwithstanding Gunter's testimony and the district attorney's argument that the minor did so, the tape provides little, if any support for such a view.

> More importantly, we note that the evidence of culpability was very strong. The minor had a motive to retaliate against Magdelano and Luis. Magdelano testified that the minor . . . stood close by before the shooting. Magdelano was not impeached in any significant way concerning the minor's presence at the scene. The minor ran and was later stopped by police as he was preparing to leave the area with his family. Last, the minor gave Gunter a false alibi.
>
> Under the circumstances, even if we assume that counsel should have sought to suppress the tape as involuntary and the court would have granted the motion, we would not find a reasonable probability that the court would have found that the minor was not present during the shooting or otherwise reached a more favorable determination. Simply put, the admission of the tape does not undermine our confidence in the court's orders.

Ex. E at 13-14.

Petitioner argues that the court of appeal's analysis was faulty because the case against him was weak, not strong, and because his statements were incriminatory, not exculpatory. Petitioner points out that at trial the State argued that his affirmative answer to Officer Gunter's question "you went outside to

protect your family" showed an intent to aid and abet Felix and that his vacillation about being outside with Felix was evasive. Petitioner concludes, "With so little evidence in support of a finding [Petitioner] aided or assisted [Felix] in the shooting, [Petitioner's] statements to police played a vital role in the state's case. It was reasonably probable the outcome would have been different had the statements been excluded."

Petitioner's argument is unpersuasive. In its denial of Petitioner's insufficient evidence claim, the appellate court relied on the following:

(1) Petitioner had a motive to assault or kill Magdelano and Luis, as evidenced by the facts that: (a) after Petitioner moved to the trailer park, he threw gang signs at Magdelano; (b) Magdelano punched Petitioner in the face; (c) Magdelano and Luis spoke to Petitioner's father and Felix about avoiding problems; and (d) several weeks later, someone shot at Petitioner's trailer;

(2) Petitioner acted in concert with Felix as evidenced by the facts that: (a) Petitioner ran with Felix to a hiding place; (b) as Magdelano and Luis approached, Petitioner and Felix emerged together from hiding; (c) Petitioner stood somewhat behind Felix, in a position to see and provide back-up support; and (d) Petitioner knew that Felix had a shotgun;

(3) Petitioner's behavior after the shooting indicated consciousness of guilt as evidenced by the facts that: (a) Petitioner fled from the scene after the shooting and then attempted to leave the trailer park with his family; and (b) he gave a false alibi to the police.

Thus, the fact that Petitioner also gave the false alibi when he was interviewed by Officer Gunter on the night of the shooting. Therefore, the appellate court had no need to refer to the interview of Petitioner at the police station the next day in order to find consciousness of guilt from providing a false alibi. Thus, there was sufficient evidence to support the conviction without the tape.

Additionally, regardless of what the State argued in its effort to get the videotaped interview admitted into evidence, once the

court viewed the tape, the tape spoke for itself. The key passage in the interview is Petitioner's exchange with Officer Gunter when he appears to change his mind about his alibi:

> Q: And, see, that's why you're not — you're not a liar. And I don't want to say you are. You just don't . . . want to put that out there that you've talked to me and told me the truth about this thing. But you've got to for one, because Juan wants to say that 'I was out there protecting my family.' Is that what you were doing? Trying to make sure nobody would come along and shoot up your house again? Is that why you were outside?
> A: When?
> Q: When the guy got shot. We're not even talking about that. We're talking about the fact that you were out there protecting your family. Is that true? Trying to warn them that if somebody came. Am I right?
> A: What do you mean, 'trying to warn them?'
> Q: Well, you had told them, 'Get Down.' You would have done something. You weren't out there with a gun —
> A: When I was right there and they shot at the house, you know, I just told my sister to get on the floor.
> Q: Okay. That was the first time —
> A: — and was my little brother and my little sister.
> Q: And that would have scared me because they're cute as buttons. They're nice little kids, okay?
> A: (Nodding).
> Q: And then, the second time, you guys went out to look to make sure nobody was coming, didn't you?
> A: (No response).
> Q: You did, didn't you?
> A: Yeah.
> Q: Yeah, you did. And I know that, and there's nothing wrong. You love your family. And I can't — I'm not angry with you. I wasn't angry with you last night, was I? I treated you with dignity and respect. Fair enough, and your family, did we? The officers did. I hope they did,

because that would make me feel bad if they didn't. Because that's all we got, bud, okay? And I know why you were out there. You were out there to protect your family. Am I telling the truth there?
A: (Inaudible).
Q: Because you didn't want somebody to come by and shoot your family up. Am I right?
A: Mm-hmmm.
Officer Jones: For all you knew, those guys that were coming back were coming back to finish the job
Officer Gunter: Were they? That was your thought, wasn't it?
A: No.
Q: Let me ask you this: When those guys came across the street, did they have a gun?
A: I don't know.
Q: You don't know. Okay. Did you guys run to get away from there when you saw them coming or what was going on there? You were watching or did your dad go back inside —
A: Nobody was there —
Q: — to warn the family?
A: I don't know. I don't know anything about that.
Q: But you were out there?
A: No, I was in my room.
Officer Jones: We just took a giant step back because you jut told us that you were out there.
A: I never said I was out there.

Ex. J, Attachment at 26-28.

Petitioner's statements, within the context of this series of questions and answers, demonstrates that Petitioner did not equivocate or waiver in his statement that he was inside his trailer at the time of the shooting. Petitioner's affirmative response to the question that "you went out to look to make sure nobody was coming, . . . because you didn't want somebody to come by and shoot your family up . . ." could easily be

interpreted to refer, not to the events immediately preceding the shooting of Luis and Magdelano, but to the time immediately after the trailer was shot.

Even if the videotaped interview was not exculpatory, this Court concludes that the interview did not add incriminating evidence to the State's case against Petitioner. Therefore, the appellate court's denial of Petitioner's ineffective assistance of counsel claim on the ground of lack of prejudice was not an unreasonable application of clearly established federal law. Petitioner's request for relief based on ineffective assistance of counsel is denied.

III. *Miranda* Claim

Petitioner contends that his custodial interview was obtained without a valid waiver of his *Miranda* rights.

A. Legal Standard

In *Miranda v. Arizona*, 384 U. S. 436 (1966), the Supreme Court held that to protect a suspect's Fifth Amendment right against self-incrimination certain warnings must be given before a suspect's statement made during custodial interrogation can be admitted in evidence. *Miranda* requires that a person subjected to custodial interrogation be advised that he has the right to remain silent, that statements made can be used against him, that he has the right to counsel, and that he has the right to have counsel appointed. These warnings must precede any custodial interrogation, which occurs whenever law enforcement officers question a person after taking that person into custody or otherwise significantly depriving a person of freedom of action. *Id.* at 444.

Miranda warnings must be clear and not susceptible to equivocation. *United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002). They must provide "meaningful advice to the unlettered and unlearned in language which they can comprehend and on which they can knowingly act." *Id.* (internal quotation marks and brackets omitted).

Once properly advised of his rights, an accused may waive them voluntarily, knowingly and intelligently. *Miranda*, 384 U.S. at 475. The test for voluntariness is "whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *Derrick v. Peterson*, 924 F.2d 813, 817 (9th Cir. 1990). In regard to whether the waiver was knowing and intelligent, the court must determine whether the suspect had a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. *Id.* at 820.

A valid waiver of *Miranda* rights depends upon the totality of the circumstances including the background, experience and conduct of the defendant. *United States v. Bernard S.*, 795 F.2d 749, 751 (9th Cir. 1986). The government must prove waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986); *Lego v. Twomey*, 404 U.S. 477, 488-89 (1971); *Terrovona v. Kincheleo*, 912 F.2d 1176, 1180 (9th Cir. 1990). In regard to waiver, the Supreme Court stated:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case . . . mere silence is not enough. That does not mean that the defendant's silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that defendant has waived his rights. . . . in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

North Carolina v. Butler, 441 U.S. 369, 373 (1979).

Juvenile defendants are accorded heightened procedural safeguards with respect to their *Miranda* rights, commensurate with their age and experience. *Alvarado v. Hickman*, 316 F.3d 841, 853 (9th Cir. 2003). A court therefore must consider a juvenile suspect's age and experience when it determines whether a juvenile suspect voluntarily waived his or her *Miranda* rights. *Id.* at 853-55.

A suspect who has expressed a desire to have counsel present during custodial interrogation is not subject to further interrogation by the authorities until counsel is made available to him. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

In *Hinman v. McCarthy*, 676 F.2d 343, 348-49 (9th Cir. 1982), the Ninth Circuit held that *Miranda* violations are properly considered in federal habeas proceedings and are not barred by *Stone v. Powell*, 428 U.S. 465 (1976) (Fourth Amendment claims that were fully and fairly litigated in State courts cannot be raised in federal habeas proceedings). Habeas relief should be granted if the admission of statements in violation of *Miranda* "'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Pope v. Zenon*, 69 F.3d 1018, 1020 (9th Cir.1995) (quoting *Brecht*, 507 U.S. at 637), *overruled on other grounds United States v. Orso*, 266 F.3d 1030, 1037-38 (9th Cir. 2001).

B. Analysis

The interview began with Officer Gunter stating:

Gunter: Remember me? I talked to you last night at the house.

Okay. But, you know, since you're here and we're not at your house, there's something I have to do before we go back over what you told me last night, okay? You know, and that's the law, so I don't want to violate the law. Remember I told you I worry about things like that.

Now I want to remind you, you have the right to remain

silent. Anything you say can and will be used against you in a court of law. You have the right to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer we'll appoint one to represent you.

Do you understand those, [Petitioner]?
Petitioner: Um-hum.[3]
. . .
Gunter: Okay. Now you don't mind talking to me about what you told me last night, am I right, about what happened?
Petitioner: Um-hum.[4]
Gunter: Okay. Last night — do you remember what you told me last night in your bedroom?
Petitioner: Um-hum.
Gunter: Okay. Let's go back over that a little bit. There was a shooting at your house last night?
Petitioner: Um-hum.
Gunter: Am I right?
Petitioner: Um-hum.

Ex. J, Attachment at 2-3; Ex. L (videotape of interview).

Gunter then proceeded with the interview, and for approximately twenty minutes, Petitioner participated. First, Gunter questioned Petitioner about the shooting of his trailer and Petitioner responded to those questions without hesitation. Slowly, Gunter turned the questions to the shooting of Luis and Magdelano. When it became clear to Petitioner that Gunter was attempting to implicate Petitioner in the second shooting, he requested an attorney.

Petitioner: I want to — I want to make something like

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3. On the videotape, Petitioner nodded his head, indicating, "yes."

4. On the videotape, Petitioner shook his head, indicating, "no."

right here.
Jones: Like what are you talking about?
Petitioner: Like you guys said if I needed a lawyer or something?
Jones: Uh-huh.
Petitioner: Or I can't afford it, and you guys could provide one for me, or something like that?
Jones: Uh-huh.
Petitioner: Well, I want one.
Jones: Okay.
Petitioner: I figure you guys are blaming me or something.
Jones: Okay. So what are you telling me?
Petitioner: That I need a lawyer or something.
Jones: Okay. You're telling me you want a lawyer.
Petitioner: Um-hum.
Jones: Okay.
Petitioner: An attorney. You guys are accusing me of something.[5]

Ex. J, Attachment at 29-30.

The appellate court concluded:

The record supports a finding of implied waiver. As the tape reveals, the minor clearly indicated that he understood his rights, he indicated that he did not mind talking further about what happened, and he continued the interview without hesitation or objection.

The minor claims that Gunter tricked him into waiving his rights by downplaying the importance of the advisement and suggesting that it was merely a formality to protect him and not the minor. He further argues that it is not

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5. The trial court found that this was an invocation of rights and excluded the remainder of the interview. Ex. E at 12.

> clear from his response what he did not mind talking about. . . . The record does not support his claim. Gunter did not misrepresent the importance of the *Miranda* advisement or otherwise trick the minor into waiving his rights. On the contrary, Gunter was polite, professional, and, as his words reflect, concerned about following the law, especially now that the minor was subject to custodial interrogation. Moreover, the minor's expressed understanding of his rights and continued conversation with Gunter establish a knowing and intentional willingness to talk about anything and everything he was asked about.

Ex. E at 11-12.

Petitioner argues that the State appellate court failed to identify correctly the governing rule because it reviewed for abuse of discretion when *de novo* review was required. Petitioner cites *Brewer v. Williams*, 430 U.S. 387, 403-04 (1977) for the proposition that the State "has the weighty obligation to show that the waiver was knowingly and intelligently made . . . it was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" The State appellate court described the following standard for its review of the *Miranda* claim: "the judicial officer to whom the [*Miranda*] objection is made must determine whether the People have proven by a preponderance of the evidence that the defendant's waiver was indeed voluntary and knowing . . . [the appellate court must] accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained, we 'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence.'" Ex. E at 10.

The appellate court's statement that it was according great weight to the conclusions of the lower court is not an indication

that it failed to apply the *Brewer* requirement that the State"prove an intentional relinquishment or abandonment of a known right or privilege." Petitioner presents no authority for the proposition that the appellate court's giving great weight to the conclusions of the lower court is contrary to or an unreasonable application of clearly established Federal law.

Petitioner argues that, although he responded affirmatively that he understood the rights mentioned by Officer Gunter, it was never clear that he waived those rights. Petitioner points out that Officer Gunter asked, "You don't mind talking to me about what you told me last night, am I right, about what happened," and Petitioner did not respond verbally but just shook his head no. Petitioner argues that he could have been shaking his head no indicating that he did not mind answering questions, or no indicating that he did not want to answer any questions.

Petitioner's argument might be persuasive if he had not then responded to Officer Gunter's questions. The tape of the interview shows that Petitioner did not mind answering Officer Gunter's questions when they appeared to pertain to the shooting of Petitioner's house. However, as the questions progressed to the events preceding the shooting of Luis and Magdelano, Petitioner answered that he knew nothing about that shooting. When it became clear to him that Officer Gunter was asking questions that would place him at the scene of the shooting, Petitioner requested an attorney. The fact that Petitioner requested an attorney when he realized he was a suspect is strong evidence that Petitioner understood his rights and freely waived them during the first part of the interview when the questions primarily pertained to the shooting of his trailer. Furthermore, although Petitioner was only fifteen years old at the time of this interview, a review of the tape shows he was not unsophisticated and that he had had some prior experience with law enforcement. The Court concludes, based upon the fact that Petitioner freely took part in the interview after he shook his head negatively in response to Officer Gunter's question, that by shaking his head negatively,

Petitioner was indicating that he did not mind answering questions. Thus, he waived his rights to remain silent and to counsel up until the point he invoked those rights.

Petitioner also argues that his waiver was not voluntary, knowing or intelligent because, before advising Petitioner of his rights, Officer Gunter said he was reading them to Petitioner only because it was a formality and something he had to do, not because the advisement was important in any way. Petitioner cites *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991) and *Ramirez v. State*,739 So. 2nd 568, 575-76 (Fla. S. Ct. 1999) for the proposition that even when officers advise an accused of his *Miranda* rights, there is no knowing and intelligent waiver where the officers downplay the importance of the advisement.

The facts of *Collazo* and *Ramirez* are distinguishable from the facts of this case. In *Collazo,* the defendant was taken to the police station and read his *Miranda* rights. *Collazo*, 940 F.2d at 413-14. In response, the defendant asked to speak to his wife and this request was refused. *Id.* at 414. After some discussion about where he was on the day of the murder and another rejected request to speak to his wife, the defendant requested to speak to an attorney. *Id.* The officer then attempted to pressure him into dispensing with counsel and answering questions about the murder. *Id.* The court quoted these lines from the interview:

> Defendant: Oh, you know, ah, can I, you know, talk to a lawyer?
> Officer: It's up to you. This is your last chance to talk to us, though.
> Defendant: I understand that.
> Officer: Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police. Then it might be worse for you.
> Defendant: Pardon me?
> Officer: Then it might be worse for you.
> Defendant: Why?
> Officer: Because, ah, you know, there's other people

> involved in this thing, and we would like to get everybody. If you don't want to talk about it, uh —
> Second Officer: Well, he's asked for a lawyer, so why don't we, I guess we'll end our interview right there.

Id. at 414.

The court concluded that the officer's warning that it might be worse for the defendant if he didn't cooperate with the police was menacing and coercive. *Id.* at 416. In this case, after Petitioner requested an attorney, Officer Gunter did not make any similar statements. Furthermore, at the time Officer Gunter informed Petitioner of his *Miranda* rights, his demeanor was friendly, he spoke distinctly and he looked directly at Petitioner. He asked Petitioner if he understood his rights and Petitioner nodded indicating that he did understand them. Officer Gunter's prefatory remarks about the law do not indicate that Officer Gunter misrepresented the importance of the *Miranda* rights or tricked Petitioner into waiving his rights. The fact that Petitioner later invoked his rights indicates he did understand their importance and did not feel intimidated by Officer Gunter.

In *Ramirez*, the officers took the defendant into custody and began questioning him without informing him of his *Miranda* rights. *Ramirez*, 739 So. 2d at 572. In response to the officer's questions, the defendant admitted breaking into the victim's home the night of the murder. *Id.* After the defendant made this admission, the second detective suggested that the defendant be informed of his *Miranda* rights, saying, "Why don't you let [defendant] know about his rights. I mean, he'd already told us about going in the house and whatever. I don't think that's going to change [defendant's] desire to cooperate with us." *Id.* The defendant asked if he were being arrested and he was told no, he was just going to be informed of his rights. *Id.* After the *Miranda* rights were administered, the defendant nodded and stated,"I guess that is what I'm here for." *Id.* The defendant eventually admitted involvement in the murder as well as the burglary. *Id.* After the defendant fully confessed to the murder, the detectives belatedly obtained a written waiver

of his *Miranda* rights. *Id.* The court determined that the defendant's waiver was not voluntary, knowing or intelligent because the *Miranda* warnings were not given until the defendant had made significant admissions of guilt and because one of the detectives minimized their significance by suggesting that he did not expect the defendant to invoke his rights. *Id.* at 576. The court also noted that by suggesting that the defendant would not invoke his rights because he had already partially confessed, the officers exploited his prior unwarned statements and used them against him. *Id.* Further, the court noted that the police lied to defendant by telling him that he was not under arrest when he had already implicated himself in the crime and there was independent corroboration of his involvement, so there was sufficient probable cause to arrest him. *Id.* at 577.

In this case, none of the factors noted by the *Ramirez* court were present. The *Miranda* warnings were administered to Petitioner at the very beginning of the interview, not after the questioning had begun; Petitioner made no admission of guilt that was exploited by Gunter; Gunter did not minimize the significance of the warnings; and Gunter did not lie to Petitioner about not being under arrest.

Thus, the State appellate court's denial of Petitioner's claim that his waiver was not knowing, voluntary or intelligent was not an unreasonable application of clearly established federal law.[6]

Furthermore, as discussed above in regard to ineffective assistance of counsel, the admission of the interview by the trial

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6. There is pre-AEDPA case law holding that a federal habeas court must independently consider the voluntariness of a confession rather than defer to the State appellate court's findings. *See, e.g., Miller v. Fenton*, 474 U.S. 104, 116 (1985); *Derrick*, 924 F.2dat 818. Although this doctrine has not been expressly overruled, it may no longer be good law in light of the increased amount of deference now required by AEDPA. However, even under the pre-AEDPA standard which required independent consideration without deference to the State court's determination, Petitioner would not prevail on this claim.

court was not prejudicial to Petitioner and therefore did not have a substantial and injurious effect or influence on the outcome of the trial. The videotape served to correct Officer Gunter's misinterpretation that Petitioner had admitted to being outside at the time of the shooting and then changed his mind. The most inculpatory part of the interview was Petitioner's statement that he was inside his house at the time of the shooting; however, he was merely repeating the statement he had made to Officer Gunter the night of the shooting. Even if the taped interview had been excluded, the interview at his home the night of the shooting would have been admitted because Petitioner was not in custody at that time so *Miranda* warnings were not required. Therefore, Petitioner's claim for relief on the ground of a *Miranda* violation is denied.

CONCLUSION

For the foregoing reasons, Petitioner's petition for writ of habeas corpus is DENIED. Petitioner's request for oral argument and an evidentiary hearing is DENIED.

DATED: 2/17/04

/s/
CLAUDIA WILKEN
United States District Judge

APPENDIX C

Filed 12/11/00

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA**

SIXTH APPELLATE DISTRICT

In re JUAN H., a Person Coming Under the Juvenile Court Law.	**No. H020349**
THE PEOPLE OF THE STATE OF CALIFORNIA	**Monterey County Super. Ct. No. J33672**
Plaintiff and Respondent,	
v.	
JUAN H.,	
Respondent-Appellant.	

I. Statement of the Case

On March 29, 1999, the Monterey County District Attorney filed a petition for juvenile wardship under Welfare and Institutions Code section 602,[1] alleging that Juan H., a minor, committed first degree murder and attempted murder. After a

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1. All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

jurisdictional hearing on May 21, 1999, the court sustained the petition. At the dispositional hearing, the court denied a motion to dismiss the petition or conduct a new jurisdictional hearing and committed the minor to the California Youth Authority (CYA) for a term of up to 34 years and eight months.

The minor appeals from the jurisdictional and dispositional orders. He contends the court erred in denying his motion to dismiss the petition and in later admitting evidence of his statement to the police. He claims defense counsel rendered ineffective assistance in failing to object to the admission of his statement on the ground it was coerced. Last, he claims there is insufficient evidence to support the jurisdictional finding.

We affirm the orders.

II. Facts

Sylvester Magdelano lived in trailer number 23 at a trailer park in Salinas. In the fall of 1998, the minor, age 15, and his family, including his older brother Felix, age 22, moved into trailer number 18. There were problems between the minor's family and other residents of the trailer park. According to Magdelano, the minor "would always throw gang signs" and try to "stare [Magdelano] down." Magdelano attributed this conduct to the fact that while Magdelano was affiliated with a Norteno group, the "Santa Rita Boys," and most of those in the trailer park socialized with Nortenos, the minor's family appeared to associate with rival Surenos.

Magdelano testified that around March 10, 1999, he went up to the minor, told him to stop throwing gang signs, and then punched him in the face. The minor fell to the ground and did not respond. Later, Magdelano and three friends, including Luis Ramirez, talked to Felix and the minor's father about avoiding problems.

On March 24, 1999, at around 9:00 p.m., someone fired shots at the minor's trailer and a vehicle parked outside. The police responded and spoke to the family, but no one had seen the shooter. Later, at around 10:30 p.m., Magdelano and his friend Luis were returning from a gym near the trailer park. They saw

the minor's family outside their trailer. The minor and Felix were talking to someone in a white truck. As Magdelano and Luis got closer, the minor and Felix suddenly ran into the trailer park and hid. Neither appeared to be carrying anything. Magdelano and Luis proceeded. When they were closer to trailer 18, the minor and Felix emerged from behind a parked vehicle and walked to them. The minor stood next to but a little behind Felix. Felix asked if they were the ones who "shot up his pad." When Luis responded that he did not know what Felix was talking about, Felix lifted a double-barreled shotgun from his side and fired at Luis.[2/] Luis fell down. Magdelano immediately started to run, but after a short distance, he slipped and fell. He heard a second shot. He then saw the minor and Felix flee toward their trailer. The minor ran inside, and Felix got into a vehicle and drove away. Magdelano ran home and had his father call "911." He then returned to Luis and waited for paramedics to arrive.

When Officer Richard Anderson of the Salinas Police Department arrived at the scene, a large, hostile crowd had gathered, and the minor and his family, except for Felix, were in a van, backing out of the driveway. Anderson ordered them to stop. Officer Richard Maldanado of the Salinas Police Department searched the area and found two spent shotgun shells near a vehicle parked near trailer 22.

Officer Joseph Gunter of the Salinas Police Department spoke to the minor that night. The minor said he was inside his trailer when he heard some arguing outside and the sound of a gun firing. He denied being outside at the time of the shooting. The next day, Gunter interviewed the minor at the police station. The interview was videotaped. At the hearing, Gunter testified that during the taped interview, the minor changed his

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2. Shortly after the shooting, Magdelano variously said that Felix pulled the gun from his side or from his waistband. At a previous court hearing, Magdelano said Felix pulled the shotgun from the front but he was not certain.

story, saying first that he was in the trailer, then admitting he was outside, and then returning to his first story.

The Defense[3]

Ricardo Rubio testified that on the night of the shooting, his friend Felix came to his house. He was pale and scared. He had a 36-inch long shotgun with him. He said he had shot one person and fired at another. He explained that when the victim said, "What are you going to do, shoot me or what," he pulled the gun and shot him. Felix did not mention that the minor was with him.

Rebuttal by the State

Magdelano testified that he told the officers the shotgun came from Felix's side, not from his front or from inside his pants. He was certain Felix had the gun at his side and that the minor could have seen it from where he was standing. Magdelano also testified that the minor was not armed and did not say or do anything during the shooting.

The court admitted and played the videotape of the minor's interview with Gunter.

Billy Martinez lives in the trailer park and was friendly with Magdelano and Luis. He testified that on the night of the shooting, he heard two shots and ran outside. He saw Luis on the ground and Magdelano running for help. He saw the minor with his family standing next to their vehicle. The minor stared menacingly at him, imitated a gun with his finger, and pointing it at Martinez said, "You guys better watch it." Martinez said he told this to his vice-principal and Gunter.

Rebuttal by the Minor

John Gutierrez, the vice principal at Martinez's school, and Gunter testified that they spoke to Martinez and he did not

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3. After the State completed its case, the minor moved to dismiss the petition. (See § 701.1.) The motion was denied.

mention the minor's gesture or remark.

III. Motion to Dismiss

The minor contends the court erred in denying the motion to dismiss he made at the close of the State's case in chief. We disagree.

In ruling on a motion to dismiss at the close of the State's case, the court must weigh the State's evidence, evaluate the credibility of witnesses, and determine whether the case is sufficient to establish culpability beyond a reasonable doubt. (*In re Andre G.* (1989) 210 Cal.App.3d 62, 65-66.) In reviewing the denial of a motion to dismiss, we apply the substantial evidence test, under which we view the record in the light most favorable to the court's order and presume in support thereof the existence of every fact that may reasonably be deduced from the evidence. (*In re Man J.* (1983) 149 Cal.App.3d 475,482; see *People v. Johnson* (1980) 26 Cal.3d 557, 576.) "Accordingly, we may not set aside the trial court's denial of the motion on the ground of the insufficiency of the evidence unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached by the court below." (*People v. Wong* (1973) 35 Cal.App.3d 812, 828.)

The minor claims the State presented insufficient evidence to establish his culpability for murder and attempted murder on the theory that he aided and abetted Felix. He argues that there is no evidence he knew that Felix intended to commit these offenses and no evidence he encouraged, facilitated, or assisted Felix. He further argues that merely being present during the shooting is not enough to establish liability as an aider and abettor. We are not persuaded.

"To be liable as an aider and abettor, the person must act both with knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 121 1, 127 1, fn. 19.) Factors relevant in determining liability as an aider and abettor include a person's presence at the scene of the crime,

companionship with the actual perpetrator, and conduct before and after the crime, including flight. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 217.)

The record supports a finding that the minor and Felix had a motive to commit the offenses. After the minor moved to the trailer park, he began throwing Sureno gang signs at the Norteno Magdelano. Magdelano, in turn, punched the minor in the face, knocking him down. Thereafter Magdelano and Luis spoke to the minor's father and Felix about avoiding problems. However, one night a couple of weeks later, someone shot at the minor's trailer, and Felix suspected Magdelano and Luis.

The record further reasonably supports an inference that the minor and Felix acted in concert in confronting Magdelano and Luis and that the minor knew Felix had a shotgun and planned to assault or shoot them with it. In particular, the minor and Felix were together outside the trailer, and, upon seeing Magdelano and Luis, they both ran to a hiding place, where Felix retrieved a 36-inch shotgun.[4] As Magdelano and Luis approached, the minor and Felix emerged together from hiding and confronted them. The minor stood somewhat behind Felix, in a position to see and provide back-up support. Felix did the talking and accused Magdelano and Luis of shooting at their trailer. Immediately after Luis responded, Felix shot him. Magdelano ran but fell and then heard a second shot.

Last, the court could reasonably find that the minor's conduct after the shooting manifested his consciousness of guilt. He and Felix fled together toward their trailer, and a short time later police intercepted the minor trying to leave the area with his family. (See CALJIC No. 2.52 [flight may reflect consciousness of guilt].) Moreover, when questioned by the

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4. Magdelano testified that he did not see Felix or the minor carrying anything, let alone a 36-inch shotgun, when they first ran and hid. Nor did he notice that Felix had trouble running at that time. This evidence supports an inference that Felix retrieved the gun from their hiding place.

police, the minor gave a false alibi: He was in the trailer and not present during the shooting. (See CALJIC No. 2.03 [willfully false statement to police may reflect consciousness of guilt].)

In short, the court could reasonably find that both the minor and Felix intended to confront Magdelano and Luis and shoot, or at least assault, them with the shotgun. The court could also reasonably find that the minor intended to promote, assist, and facilitate the intended attack.[5]

The minor notes that when he and Felix understanding before Magdelano and Luis, he did not do or say anything to encourage, assist, or facilitate Felix. However, the minor overlooks his conduct in concert with Felix prior to and after the shooting, which gives purpose and intent to his silence and position and rebuts any notion that he was just an unknowing and innocent bystander.

The minor argues that any inference of a consciousness of guilt from his flight is purely speculative because Felix fled in a car and the minor ran home. He submits that his flight was no more indicative of a consciousness of guilt than Magdelano's flight from the scene. We are unpersuaded. Both the minor and his brother ran in the same direction. Understandably, Felix, who had the shotgun, decided to flee the area by car.

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5. Even if we assume that Felix and the minor intended only to assault Magdelano and Luis with the shotgun, the court could find the minor culpable for the murder and attempted murder based on a finding that both offenses were the natural and probable consequences of an assault he intended to aid and abet. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 261-262 and cases cited there; *People* v. *Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) We recognize that unlike murder, attempted murder requires a specific intent to kill. (*People* v. *Carpenter* (1997) 15 Cal.4th 312, 391.) However, the court could reasonably infer that whatever may have been Felix's mental state before he murdered Luis, after he did so he decided to kill Magdelano too. Thus, both Felix's specific intent to kill and the attempted murder could reasonably be deemed the natural and probable consequences of the assault. (See *People v. Laster* (1997) 52 Cal.App.4th 1450 [conviction for attempted murder based on theory that offense was natural and probable consequences of aiding and abetting offense of discharging firearm from vehicle] .)

Magdelano, on the other hand, ran to avoid injury and get help for Luis. Under the circumstances, the minor's flight was more akin to that of Felix than that of Magdelano.

The minor argues that there is no evidence *he* thought Magdelano or Luis were the persons who shot at his trailer, and therefore no evidence he had a motive to attack them. He further argues that he had a reason to give a false alibi—to protect Felix. Thus, his alibi does not reasonably reflect his consciousness of guilt. He also claims that any evidence of motive and consciousness of guilt is insufficient to establish his culpability.

We disagree that there was no evidence of motive. As noted, Magdelano punched the minor. Felix and the minor suspected Magdelano and Luis of shooting into their trailer. Moreover, the minor never told anyone he lied to protect Felix. Nor did he provide any other plausible reason for giving a false alibi. (See *People v. Castro* (1958) 50 Cal.2d 75, 93; cf. *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839.) Thus, the alibi reasonably reflects a consciousness of guilt. We agree that the evidence of motive and consciousness of guilt is insufficient standing alone to prove the minor's culpability. However, when this evidence is considered together with his conduct and evidence of flight, we find ample basis to support a finding of culpability beyond a reasonable doubt.

Last, the minor argues that there was no evidence to support a finding that he or Felix attempted—i.e., specifically intended—to kill Magdelano. He notes that after Magdelano fell, he was not hit by shotgun pellets and did not hear any pellets land near him. Moreover, when he looked up, the minor and Felix were fleeing. Last, we note that police found the empty shells closer to Luis, and pellets were found in his wound.

As noted above, the court could reasonably find that whatever may have been the minor and Felix's initial intention upon confronting Magdelano and Luis, after Felix shot and killed Luis, he intended his second shot to kill Magdelano. (See also fn. 5, *ante*.) That Magdelano was not hit and did not hear

pellets does not conclusively establish that Felix did not fire at him. Magdelano had already fled some distance and fallen down. Moreover, the evidence indicates that Luis fell down after being shot once. He had only one shotgun wound. And there is no evidence that the number of pellets found in his wound exceeded the number contained in a single shell.

In sum, we find that the State produced sufficient evidence to sustain the petition, and, therefore, the court properly denied the minor's motion to dismiss.[6]

IV. Admission of the Videotape

A. Waiver of *Miranda*[7] Rights

The minor contends that in admitting the videotape of his interview, the court violated the *Miranda* rule.[8] In particular,

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6. In light of our analysis and conclusion, we reject the minor's separate contention that there is insufficient evidence presented at the entire jurisdictional hearing to support the court's order. The additional evidence presented during rebuttal only strengthened the State's case. As noted, Martinez testified that the minor made a menacing gesture and threatened him shortly after the incident. And the defense witness Rubio testified that Felix told him he shot at both Luis and Magdelano but did not know whether he hit Magdelano.

7. *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

8. In *Miranda, supra*, 384 U.S. 436, the United States Supreme Court observed that when an individual is subjected to custodial interrogation, his or her Fifth Amendment privilege against self-incrimination is jeopardized. To protect it as well as the exercise of the right to remain silent and have an attorney, the court established certain procedural rules for law enforcement officers to follow when questioning an arrestee. Specifically, police must warn an arrestee before any questioning that he or she has the right to remain silent, that anything he or she says can be used against him or her in a court of law, that he or she has the right to the presence of an attorney, and that if he or she cannot afford an attorney one will be appointed for him or her prior to any questioning if he or she so desires. The arrestee must then be given the opportunity to exercise these rights throughout the interrogation. Thereafter, the arrestee may waive these rights and agree to answer questions or make a statement. On the other hand, if the arrestee invokes the right to remain silent or requests the assistance of counsel, then questioning

he claims Gunter obtained the statement without obtaining a valid waiver of *Miranda* rights.

We have viewed the videotape. As the parties correctly transcribe, before interviewing the minor, Gunter stated, "Remember me? I talked to you last night at the house. Okay. But, you know, since you're here and we're not at your house, there's something I have to do before we go back over what you told me last night, okay? You know, and that's the law, so I don't want to violate the law. Remember I told you I worry about things like that. Now I want to remind you you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer we'll appoint one to represent you. Do you understand those, Juan?" The minor clearly indicated that he did. Gunter continued, "Okay. Now you don't mind talking to me about what you told me last night, am I right, about what happened." The minor shook his head, indicating "no." Gunter then proceeded with the interview, and the minor participated without hesitation for over 20 minutes.[9]

In overruling the minor's motion to exclude the tape, the trial court found that he had validly waived his *Miranda* rights. We agree.

"When a defendant objects to introduction of a confession

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must cease unless and until an attorney is provided or the arrestee makes it clear that he or she wants to give a statement and do so without counsel. (*Id.* at pp. 473-474,478-479; see *Edwards v. Arizona* (1981) 451 US. 477,482,484-485.) As further prophylaxis, the court promulgated an exclusionary rule: Unless and until the prosecution demonstrates that *Miranda* warnings were given and the specified rights were waived, it may not introduce at trial any evidence obtained as a result of custodial interrogation. (*Miranda, supra*, 384 U.S. at pp. 444,479.)

9. After approximately 26 minutes, defendant said he thought he was being accused of something and added that he needed a lawyer. The trial court found that this was an invocation of rights and excluded the remainder of the interview.

and claims a waiver of constitutional rights was invalid, the judicial officer to whom the objection is made must determine whether the People have proven by a preponderance of the evidence that the defendant's waiver was indeed voluntary and knowing. [Citations.]" (*People v. Smithson* (2000) 79 Cal.App.4th 480,498.)

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda v. Arizona, supra*, 384 U.S. 436, we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we "'give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 235-236; accord, *People v. Whitson* (1998) 17 Cal.4th 229, 248.)

A valid waiver depends on proof the defendant in fact knowingly and voluntarily waived those rights. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.) Although express oral or written statement by the arrestee that he or she is waiving *Miranda* rights is not required, courts may not presume a waiver solely from an accused silence after being advised or the fact that a confession was obtained. (*Ibid.; Miranda, supra*, 384 U.S. at p. 475.) This does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. (*North Carolina v. Butler, supra,* 441 U.S. 369.) For example, in *People v. Sully* (1991) 53 Cal.3d 1195, 1233 the defendant impliedly waived his *Miranda* rights when, after having been admonished of those rights, he responded affirmatively that he understood them and gave a tape-recorded statement to a detective. In *People v. Davis* (1981) 29 Cal.3d 814, 823-826 the defendant, a 16-year old minor, impliedly waived his rights

where he was advised, said he understood them, and thereafter made statements to investigating police officers that led to his arrest. In *People v. Johnson* (1969) 70 Cal.2d 541, 558 disapproved on another point in *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, footnote 8, the defendant was advised of his rights, indicated he understood them, and then spoke to police without requesting a lawyer. In *People v. Nitschmann* (1995) 35 Cal.App.4th 677,680-683, an implied waiver was upheld where the defendant knew and, in fact, recited his own rights and there was no evidence that he was confused, misled, or reluctant to speak.

The record supports a finding of implied waiver. As the tape reveals, the minor clearly indicated that he understood his rights, he indicated that he did not mind talking further about what happened, and he continued the interview without hesitation or objection.

The minor claims that Gunter tricked him into waiving his rights by downplaying the importance of the advisement and suggesting that it was merely a formality to protect him and not the minor. He further argues that it is not clear from his response what he did not mind talking about. In all, therefore, the minor claims the State failed to prove a valid waiver by a preponderance of the evidence. The record does not support this claim. Gunter did not misrepresent the importance of the *Miranda* advisement or otherwise trick the minor into waiving his rights. On the contrary, Gunter was polite, professional, and, as his words reflect, concerned about following the law, especially now that the minor was subject to custodial interrogation. Moreover, the minor's expressed understanding of his rights and continued conversation with Gunter establish a knowing and intentional willingness to talk about anything and everything he was asked about.

People v. Honeycutt (1977) 20 Cal.3d 150, on which the minor relies, is distinguishable. There, the police engaged in a 30-minute effort to soften up the defendant, talking about mutual acquaintances and disparaging the victim. He was not advised of his rights until three hours after his arrest. We find

no similar conduct in this case.

B. Ineffective Assistance of Counsel

The minor contends that his taped statement was inadmissible because it was coerced and involuntary. (See *People* v. *Lucas* (1995) 12 Cal.4t.h 415,441-442 ["A statement extracted by official coercion or threat is involuntary and inadmissible under the due process clauses of the state and federal Constitutions."].) In particular, he argues that during the interview Gunter relentlessly pressured him and employed a variety of improper psychological ploys that elicited an incriminating admission that he was present with Felix during the shooting. The minor acknowledges, however, that because trial counsel failed to object on this ground, he waived this claim on appeal. (E.g., *People* v. *Mayfield* (1993) *5* Cal.4th 142, 172.) Thus, he claims instead that counsel rendered ineffective assistance in failing to object to his statement as involuntary.

To demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was unreasonable when measured by prevailing professional norms and that there is a reasonable probability that but for counsel's unreasonable acts or omissions, the result of the proceeding would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Avena* (1996) 13 Cal.4th 394, 418.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) If the record does not disclose why counsel acted or failed in the manner challenged, then, unless counsel was asked for and failed to provide an explanation or there could be no satisfactory explanation, we reject the claim on appeal and affirm the judgment. Under such circumstances, the claim is more appropriately made in a petition for habeas corpus. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

We reject the minor's claim for three independent reasons. First, the record does not disclose why counsel declined to challenge the statement as involuntary. As noted, under such

circumstances, we affirm the judgment.

Second, we note that defense counsel raised a *Miranda* objection and therefore was familiar with what happened during the interview and what the minor now claims were coercive tactics. We need not discuss these allegedly improper tactics in detail because cumulatively they constitute only weak evidence of coercion. This is especially so when the alleged conduct is viewed in light of the minor's own conduct and responses. Simply put, from the beginning to the end of that portion of the interview admitted into evidence, the minor denied being with Felix and insisted that he was in the trailer. He did not appear intimidated, threatened, or cowed by what the officer said. Nor did it appear that Gunter was successful in softening him up. Rather, the minor remained distant, suspicious, and reluctant to say anything but that he was not present during the shooting. In our view, therefore, counsel could have reasonably concluded that any claim the minor's statement was involuntary would have been overruled. (See *People v. Smithey* (1999) 20 Cal.4th 936, 992 [defense counsel need not make futile motions].)

Last, we note that the taped interview was exculpatory. As noted, the minor insisted that he was inside the trailer when the shooting occurred and not with Felix. Although at one point he appeared to acquiesce to an assertion by Gunter that he was outside, he later adamantly denied being outside, and when accused of changing his story, he denied ever saying that he had been outside. Thus, the tape speaks for itself on whether the minor gave conflicting accounts of where he was that night. And, notwithstanding Gunter's testimony and the district attorney's argument that the minor did so, the tape provides little, if any, support for such a view.

More importantly, we note that the evidence of culpability was very strong. The minor had a motive to retaliate against Magdelano and Luis. Magdelano testified that the minor acted in concert with Felix and stood close by before the shooting. Magdelano was not impeached in any significant way concerning the minor's presence at the scene. The minor ran and was later stopped by police as he was preparing to leave the

area with hisfamily. Last, the minor gave Gunter a false alibi.

Under thecircumstances, even if we assume that counsel should have ought to suppress the tape as involuntary and the court wouldhave granted the motion, we would not find a reasonable pobability that the court would have found that the minor was nc present during the shooting or otherwise reached a more favorble determination. Simply put, the admission of the tape doe not undermine our confidence in the court's orders.

V. Disposition

The jurisdctional and dispositional orders are affirmed.

Wunderlich, J.

WE CONCUR:

Premo, Acting P. J.

Bamattre-Manoukian, J.

APPENDIX D

Filed 1/9//01

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JUAN H., a Person Coming Under the Juvenile Court Law.	)	**No. H020349**
	)	**Monterey County**
THE PEOPLE,	)	**Super. Ct. No. J33672**
Plaintiff and Respondent,	)	
	)	**ORDER**
v.	)	**MODIFYING**
	)	**OPINION AND**
JUAN H.,	)	**DENYING**
	)	**REHEARING**
Defendant and Appellant.	)	

It is ordered that the opinion filed herein on December 11,2000, be modified as follows:

1) On page 7, delete the first sentence of the first full paragraph beginning with "The minor notes that when . . ." and replace that sentence with the following: "The minor notes that when he and Felix were standing before Magdelano and Luis, he did not ~~do or~~ say anything to encourage, assist, or facilitate Felix."

2) On page 7, in the first sentence of the third full paragraph beginning with "The minor argues . . ." replace the word "or"

with "and". The sentence should read as follows: "The minor argues that there is no evidence *he* thought Magdelano and Luis were the persons who shot at his trailer, and therefore no evidence he had a motive to attack them.

There is no change in the judgment.

The petition for rehearing is denied.

Dated:

_____

Wunderlich, J.

_____

Premo, Acting P.J.

_____

Bamattre-Manoukian, J.

APPENDIX E

Filed 2/21/01

Court of Appeal, Sixth Appellate District - No. H020349

S094574

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JUAN H., a Person Coming Under the Juvenile Court Law.

THE PEOPLE, Plaintiff and Respondent,

v.

JUAN H., Defendant and Appellant.

Petition for review DENIED.

/s/
Chief Justice